93-833

No.——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

OPERATION RESCUE, PATRICK MAHONEY, RANDALL TERRY, and BRUCE CADLE,
Petitioners,

v.

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., and CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of Florida

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A state trial court in Florida issued an amended permanent injunction which:

—bans demonstrations within 36 feet of the property line of the Aware abortion business;

—bans "images observable" to and "sounds . . . within earshot" of patients inside Aware;

—bans "approaching" Aware patrons within 300 feet of Aware unless the patron first "indicates a desire to communicate";

—bans "approaching, congregating, picketing, patrolling, demonstrating" within 300 feet of the residence of any of the staff, owners, or agents of Aware;

—forbids defendants from "encouraging" any one to do something which the injunction prohibits.

The trial court has interpreted the injunction to apply to "pro-life" demonstrators but not "pro-choice" demonstrators.

The Eleventh Circuit, in a collateral proceeding, held that this injunction is a viewpoint-based restriction on speech in a public forum. But the Supreme Court of Florida upheld the injunction as a content-neutral "time, place, and manner regulation."

Accordingly, the questions presented are:

1. Did the court below err by holding that an injunction that restricts "pro-life" speakers but not "pro-choice" speakers is content-neutral?

2. Did the court below err by reviewing injunctive restrictions on expressive activity under the test for "time, place, and manner regulations" instead of the doctrine of prior restraints?

3. Do the injunctive restrictions at issue violate petitioners' rights to free speech, freedom of assembly, and freedom of association under the First Amendment?

PARTIES

In addition to the parties listed in the caption of this case, the following were listed as parties to the proceeding in the Supreme Court of Florida: Ed Martin, Judy Madsen, Shirley Hobbs, Operation Rescue America, Operation Goliath.

None of the petitioners in this case is a corporation. *See* Rule 29.1.

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DECISIONS BELOW

The decision of the Supreme Court of Florida is not yet reported. *Operation Rescue v. Women's Health Center, Inc.*, No. 81,905 (Fla. Oct. 28, 1993) (App. 1a). The decisions of the circuit court granting a temporary injunction (App. 41a), a permanent injunction (App. 44a), and an amended permanent injunction (App. 25a), are not reported. *Women's Health Center, Inc. v. Operation Rescue*, No. 91-2811-CA-16-K (Fla. Cir. Ct. Oct. 25, 1991 [temporary injunction], Sept. 30, 1992 [permanent injunction], Apr. 8, 1993 [amended permanent injunction]).

JURISDICTION

The opinion and judgment of the Supreme Court of Florida in this case was entered on Oct. 28, 1993. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The first amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The first section of the fourteenth amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

The Aware Woman Center for Choice ("Aware"), an abortion business in Melbourne, Florida, along with three other abortion businesses, are the respondents in this case. The petitioners are an organization and three individuals who object to the destruction of human offspring by abortion. Aware has been the site of considerable anti-abortion activity as well as counter-demonstrations by abortion supporters.

Aware and the other Respondents filed suit for injunctive relief against petitioners and others on Oct. 21, 1991, in the Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County, Florida. The circuit court granted a temporary injunction on Oct. 25, 1991 (App. 41a), and a permanent injunction on Sept. 30, 1992 (App. 44a). Both the temporary and the permanent injunctions enjoined petitioners and others from trespassing at, blocking or obstructing ingress to or egress from, and physically abusing persons entering or leaving, respondents' abortion facilities.

Neither the temporary injunction nor the permanent injunction are at issue here.

On Mar. 22, 1993, respondents moved for modification of the permanent injunction. The circuit court conducted an evidentiary trial from Mar. 31 through Apr. 2, 1993. On Apr. 8, the court entered an amended permanent injunction (App. 25a) containing the provisions challenged here.

The circuit court based its amended order on various factual findings concerning activities at the Aware facility. The court did *not* find that respondents had trespassed, engaged in rescue blockades, or physically abused any persons. (The prior permanent injunction, in any event, already prohibited such conduct.) Rather, the court found that, one to three times each week, "persons would appear at this location" (the Aware facility) in numbers varying from "a handful to a crowd of four hundred." App. 26a. These "persons" included pro-life individuals, abortion supporters, police (from five to fifty officers), and media representatives. *Id.*

The circuit court identified several purported bases for an expanded injunction:

a) *interference with ingress*—The court found that vehicular traffic would "slow down" and "sometimes . . . momentarily stop" in response to the congrestion outside Aware. *Id.*

b) *noise*—The court identified noise "emanating from" individuals both for and against abortion and from Aware's own loudspeakers broadcasting music. *Id.*

c) *leafletting occupants of vehicles*—The court found that pro-life individuals were giving literature to people in automobiles entering Aware's parking lots. App. 27a.

d) *residential demonstrations*—The court found that petitioner Cadle and others were carrying signs, distributing literature, and verbally addressing neighbors and passersby in the vicinity of the residences of Aware employees. In addition, Cadle and others demonstrated at a motel where an Aware abortionist was temporarily staying. App. 27a-28a.

e. *recording license tags*—The court found that pro-life persons recorded the license tag numbers of Aware patients, traced the numbers through state records, and then contacted the patients. App. 29a.

f. *following people*—The court found that Aware staff and patients "are sometimes followed in a stalking manner" when they leave Aware. *Id.*

The circuit court did not identify any particular individuals who had engaged in any particular activity (aside from the two references to petitioner Cadle above). Instead, the court referred in generic fashion to "people" (including abortion opponents *and* abortion supporters, police, and media), App. 26a, to "respondents [the defendants in the trial court] or persons in concert with them," App. 29a, to "persons who were loosely associated with . . . Operation Rescue and [defendant] Operation Goliath," App. 26a, and so forth.

The circuit court did not enjoin any abortion supporters from obstructing passage or creating excessive noise; instead, the injunction restrained only abortion opponents. App. 30a.

Nor did the circuit court simply enjoin the specific activities it viewed as problematic, i.e., obstructing Aware's

driveways, making excessive noise, leafletting vehicles being operated on streets and driveways, picketing in front of particular residences, tracing the identities of patients, and "stalking" Aware staff or patients. Instead, the court set up several broad, prophylactic provisions. In part, the court:

> ORDERED AND ADJUDGED that the respondents, Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, employees and servants, and Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs, and all persons acting in concert or participation with them, or on their behalf, with notice in any manner or by means of this order (hereinafter referred to generally as [defendants]) are permanently enjoined from engaging in the following:
>
> . . . .
>
> (3) At all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way or private property within thirty-six (36) feet [on three sides] of the property line of [Aware]. . . .
>
> (4) During the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside [Aware].
>
> (5) At all times on all days, in an area within three-hundred (300) feet of [Aware], from physically approaching any person seeking the services of [Aware] unless such person indicates a desire to communicate by approaching or by inquiring of the [defendants]. In the event of such invitation, the [defendants] may engage in communications consisting of conversation of a non-threatening nature and by the delivery of literature within the three-hundred

> (300) foot area but in no event within the 36 foot buffer zone. . . .
>
> (6) At all times on all days, from approaching, congregating, picketing, patrolling, demonstrating, or using bullhorns or other sound amplification equipment within three hundred (300) feet of the residence of any of the [plaintiffs'] employees, staff, owners, or agents. . . .
>
> . . . .
>
> (9) At all times on all days, from encouraging, inciting, or securing other persons to commit any of the prohibited acts listed herein.

App. 30a-33a.

First, one group of defendants appealed from the amended permanent injunction. Then, the present petitioners filed their own separate appeal.

On June 3, 1993, the Florida Fifth District Court of Appeal granted a joint motion to certify the first appeal to the Supreme Court of Florida. App. 39a. The following day, June 4, 1993, respondents moved the district court of appeal to consolidate the separate appeals. Because of the prior certification order, that motion was forwarded to and filed in the state supreme court, along with the briefs already filed. The state supreme court subsequently granted the present petitioners leave to file their own brief on the merits and thereafter treated the separate appeals as consolidated.

In their respective briefs, the present petitioners and the other defendants-appellants argued that the injunction was content-based, imposed a prior restraint on speech in a public forum, and imposed vague and overbroad restrictions on expressive activity, all in violation of the federal constitutional rights to free speech, assembly and association.

Meanwhile, a collateral lawsuit was proceeding in federal court. A certain Myrna Cheffer, on Apr. 13, 1993,

had filed suit in the U.S. District Court for the Middle District of Florida. Cheffer alleged that she was a pro-life activist who was not in concert with the defendants in the state court action and who nevertheless faced a threat of enforcement, against her, of the state injunction. Cheffer sought a preliminary injunction in federal court to prevent enforcement of the state court injunction against her.

On Apr. 14, 1993, the federal district court denied Cheffer's motion for a preliminary injunction.

Cheffer appealed, and on Oct. 20, 1993, the U.S. Court of Appeals for the Eleventh Circuit vacated and remanded. *Cheffer v. McGregor,* No. 93-2407 (11th Cir. Oct. 20, 1993) (1993 WL 416820) (App. 49a). After resolving the questions of standing and abstention in Cheffer's favor, the federal court of appeals proceeded to hold that the state court injunction imposed a viewpoint-based restriction on speech in a public forum. As the Eleventh Circuit explained:

> That the speech restrictions at issue here are viewpoint-based cannot seriously be doubted. The order enjoins
>
> > Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, employees and servants, and Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs, and all persons acting in concert or participation with them, or on their behalf. . . .
> >
> > Such a restriction is no more viewpoint-neutral than one restricting speech of "the Republican Party, the state Republican Party, George Bush, Bob Dole, Jack Kemp and all persons acting in concert or participation with them or on their behalf." The practical effect of this section of the injunction was to assure that while "pro-life"

> speakers would be arrested, "pro-choice" demonstrators would not.

1993 WL 416820 at *6 (App. 60a). The Eleventh Circuit held that Cheffer was likely to prevail on the merits of her constitutional challenge to the injunctive restrictions, *id.* at *5-*6 (App. 58a-61a), and remanded to the district court to reconsider the issuance of a preliminary injunction.

Eight days later, the Supreme Court of Florida—despite its stated awareness of the *Cheffer* decision—upheld the constitutionality of the state circuit court's amended permanent injunction. *Operation Rescue v. Women's Health Center, Inc.*, No. 81,905 (Fla. Oct. 28, 1993) (App. 1a). In a unanimous *per curiam* opinion, the state supreme court affirmed the injunction in its entirety.

Contrary to the Eleventh Circuit, the Florida Supreme Court held that the injunction imposed only content-neutral time, place, and manner regulations on expressive activity. Slip op. at 16-22 (App. 14a-19a). The court held that the special government interest in protecting the privacy of the home "applies even more convincingly," *id.* at 18 (App. 16a), and "with even greater force," *id.* at 20 (App. 17a), to abortion businesses. The court held that the doctrine of prior restraints applies only to "content-based restrictions on speech prior to its occurrence," *id.* at 22 (App. 19a), and that the present injunction was content-neutral—even though it only applied to abortion opponents—because the restrictive provisions did not explicitly limit what pro-life individuals could say, *id.* at 16 (App. 14a). The court also held that the restrictions at issue were neither vague nor overbroad. *Id.* at 22-25 (App. 19a-22a).

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Florida in this case is in direct conflict with a decision of the U.S. Court of Appeals for the Eleventh Circuit regarding the very same injunction. The decision below also conflicts in several important respects with the decisions of other state appellate courts and federal courts of appeal. Furthermore, the decision below squarely conflicts with the applicable decisions of this Court.

The issues presented in this case are of considerable national significance. Across the nation, abortion businesses have used suits for injunctive relief in an effort to restrain anti-abortion activities. These suits seek to forbid, not just trespasses and blockades, but also classic free speech activities like picketing, leafletting, and verbal communication in traditional public forum sidewalks and rights of way.

The lower courts are sharply divided in their responses to these injunction requests. Some state and federal courts have steadfastly upheld the crucial distinction between illegal conduct and otherwise lawful speech activity.[1]

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[1] *E.g., Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989) (affirming refusal to enjoin picketing outside abortion business); *National Organization for Women v. Operation Rescue*, 914 F.2d 582, 586 (4th Cir. 1990) (per curiam) (affirming refusal to enjoin activities at abortion businesses that "tend to intimidate, harass or disturb patients" because of threat to free speech), *vacated on other grounds sub nom. Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993); *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989) (affirming order enjoining trespass but allowing sidewalk counselling), *cert. denied*, 495 U.S. 947 (1990); *Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue*, 406 Mass. 701, 713-14, 715-16, 550 N.E.2d 1361, 1369, 1370 (1990) (injunction may forbid only illegal activity, not legal expressive activity; upholding injunction so limited); *O.B.G.Y.N. Ass'n v. Birthright of Brooklyn and Queens, Inc.*, 64 A.D.2d 894, 407 N.Y.S.2d 903 (1978) (upholding injunction in part but reversing restrictions on lawful expression); *Parkmed Co. v.*

Other courts—like the court below—have jettisoned constitutional principles and enjoined otherwise lawful picketing, leafletting, and sidewalk counseling.[2] Still other courts are in the midst of confronting these same issues in currently pending appeals.[3]

Pro-life Counseling, Inc., 91 A.D.2d 551, 457 N.Y.S.2d 27 (1982) (same); *Chico Feminist Women's Health Center v. Scully*, 208 Cal. App. 3d 230, 256 Cal. Rptr. 194 (1989) (affirming refusal to enjoin picketing and sidewalk counseling from front of abortion facility); *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W.2d 401 (N.D. 1992) (overturning injunctive restrictions on picketing and sidewalk counseling); *Ex parte Tucci*, 859 S.W.2d 1 (Tex. 1993) (invalidating 100-foot "speech-free zone" outside abortion businesses); *Valenzuela v. Aquino*, 853 S.W.2d 512 (Tex. 1993) (vacating injunction against residential picketing).

[2] *E.g.*, *Northeast Women's Medical Center, Inc. v. McMonagle*, 839 F.2d 57 (3d Cir. 1991); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988); *Hirsh v. City of Atlanta*, 261 Ga. 22, 401 S.E.2d 530, *cert. denied*, 111 S. Ct. 2836, 112 S. Ct. 75 (1991); *Planned Parenthood Ass'n of Cincinnati, Inc. v. Project Jericho*, 52 Ohio St. 3d 56, 556 N.E.2d 157, *reh'g denied*, 53 Ohio St. 3d 706, 558 N.E.2d 61 (1990); *Bering v. SHARE*, 106 Wash. 2d 212, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050 (1987); *Klebanoff v. McMonagle*, 380 Pa. Super. 545, 552 A.2d 677 (1988), *alloc. denied*, 563 A.2d 888 (Pa. 1989); *Kaplan v. Prolife Action League of Greensboro*, —— N.C. App. ——, 431 S.E.2d 828 (1993), *appeal dismissed, review denied*, —— N.C. ——, —— S.E.2d —— (Oct. 18, 1993) (No. 350P93).

[3] *E.g.*, *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 12 Cal. App. 4th 1817, 16 Cal. Rptr. 2d 540, *review granted*, 851 P.2d 774, 19 Cal. Rptr. 2d 492 (Cal. 1993); *Horizon Health Center v. Felicissimo*, 263 N.J. Super. 200, 622 A.2d 891 (App. Div. 1993), *certif. granted*, No. 36,728 (N.J. July 15, 1993); *Boffard v. Barnes*, 264 N.J. Super. 11, 624 A.2d 1 (App. Div.), *certif. granted*, 627 A.2d 1150 (N.J. 1993); *Murray v. Lawson*, 264 N.J. Super. 17, 624 A.2d 3 (App. Div.), *certif. granted*, 627 A.2d 1149 (N.J. 1993); *Women's Health Center of Duluth v. Operation Rescue*, No. CO-93-601157 (Minn. Dist. Ct. July 28, 1993) (issuing injunction creating 50-foot speech-free zone at abortion facility and two-block speech-free zone at residences), *appeal pending*, No. C9-93-1776 (Minn. Ct. App. appeal docketed Sept. 2, 1993); *Planned Parenthood of the Rocky Mountains, Inc. v. Operation Rescue National*, No. 93 CV

This Court should grant the present petition for a writ of certiorari and put a halt to what is rapidly becoming constitutional bedlam in the lower courts.

I. THE DECISION OF THE SUPREME COURT OF FLORIDA DIRECTLY CONFLICTS WITH THE ELEVENTH CIRCUIT'S DECISION REGARDING THE VERY SAME INJUNCTION.

The Supreme Court of Florida, in the decision below, upheld in its entirety the amended permanent injunction at issue. The state supreme court held that the injunction was a "content-neutral" and constitutional regulation of the time, place, and manner of speech in a traditional public forum. App. 13a-19a.

Yet just eight days prior to the decision of the state supreme court, the U.S. Court of Appeals for the Eleventh Circuit, in a separate, collateral proceeding, held the exact opposite: that the very same amended permanent injunction was a "viewpoint-based restriction" on speech in a traditional public forum, *Cheffer v. McGregor*, No. 93-2407 (11th Cir. Oct. 20, 1993) (1993 WL 416820) (App. 49a), and that the plaintiff in *Cheffer* was likely to prevail on the merits of her claim that the amended permanent injunction was unconstitutional. App. 58a-61a.

The state supreme court made no effort to explain why it refused to follow the Eleventh Circuit's holding. Instead, the court simply stated, in a concluding footnote, that it "recognize[d]" the fact of the Eleventh Circuit's ruling. Slip op. at 28 n.10 (App. 24a).

The decisions of the Florida supreme court and the Eleventh Circuit are flatly contradictory. This Court should grant review to settle this glaring conflict.

4266 (Colo. Dist. Ct. Aug. 10, 1993) (issuing injunction creating 25- to 79-foot speech-free zones at abortion facilities), *appeal pending*, No. 93 CA 1613 (Colo. Ct. App. filed Sept. 24, 1993).

II. THE DECISION OF THE SUPREME COURT OF FLORIDA DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER STATE AND FEDERAL COURTS.

The decision of the Supreme Court of Florida in this case conflicts in several important respects with the decisions of other state and federal courts.

A. Ban on Speech on Public Sidewalks and Rights of Way Adjacent to Aware

The decision of the Supreme Court of Florida upholding an absolute "speech-free zone" on traditional public forum property is in direct conflict with decisions of the U.S. Courts of Appeals for the Second, Third, Fourth, Fifth, Eighth, and Tenth Circuits, as well as state appellate courts in Georgia, Massachusetts, New Jersey, New York, North Dakota, Ohio, Pennsylvania, and Texas.

The court below upheld an injunction which, within 36 feet of the property line on three sides of Aware's property, and within 5 feet on the remaining side, totally suppresses all of petitioners' speech activities, including picketing, leafletting, and pure verbal communication. This "speech-free zone" swallows up street, sidewalk, and unpaved pedestrian right of way alike, and forces petitioners completely across the street on three sides of the property (including the side where Aware's patients enter).

In sharp contrast with this decision, federal courts overwhelmingly refuse to approve the creation of "speech-free zones" on sidewalks adjacent to the picketed facility. *See Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989) (refusing to enjoin picketing and sidewalk counseling within 500 feet of abortion business); *National Organization for Women v. Operation Rescue*, 914 F.2d 582, 586 (4th Cir. 1990) (per curiam) (affirming refusal to enjoin those who "sought, through verbal means, to persuade women not to seek the services of abortion clinics and to 'impress upon members of so-

ciety' the moral rightness and intensity of their opposition to abortion" because such activities are "clearly protected by the First Amendment"), *vacated on other grounds sub nom. Bray v. Alexandria Women's Health Clinic,* 113 S. Ct. 753 (1993); *New York State NOW v. Terry,* 886 F.2d 1339, 1345 n.1, 1363 (2d Cir. 1989) (injunction specifically permits "sidewalk counseling, consisting of reasonably quiet conversation of a non-threatening nature not by more than two people with each person they are seeking to counsel") ("defendants are entitled to express their views on [abortion], particularly when standing on a public sidewalk where, since time immemorial, the authority to regulate speech is sharply restricted") (citation omitted), *cert. denied,* 495 U.S. 947 (1990); *Roe v. Operation Rescue,* 710 F. Supp. 577, 589 (E.D. Pa. 1989) (same), *aff'd in relevant part, rev'd in part,* 919 F.2d 857 (3d Cir. 1990). *Accord Howard Gault Co. v. Texas Rural Legal Aid, Inc.,* 848 F.2d 544, 558-61 (5th Cir. 1988) (overturning ban on more than two pickets within 50 feet of any other picketers); *United Food and Commercial Workers Int'l Union v. IBP, Inc.,* 857 F.2d 422, 430-32 (8th Cir. 1988) (same); *Davis v. Francois,* 395 F.2d 730 (5th Cir. 1968) (ban on more than two picketers at a building "patently unconstitutional"). *See also Cannon v. City and County of Denver,* 998 F.2d 868, 874 (10th Cir. 1993) ("the right of the protestors to picket on the public sidewalk in front of the clinic" with signs calling an abortion business a "killing place" is "a clearly established constitutional right").

State appellate courts in other states likewise refuse to sanction injunctive restrictions on speech in public fora. *See Ex parte Tucci,* 859 S.W.2d 1 (Tex. 1993) (100-foot "speech-free zone" around abortion business unconstitutional); *Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue,* 406 Mass. 701, 713-14, 550 N.E.2d 1361, 1369 (1990) (injunction may cover only unlawful activity: "some of the defendants' activities

at the protests, such as singing and chanting on public sidewalks, are protected, expressive activity"); *Parkmed Co. v. Pro-life Counseling, Inc.*, 91 A.D.2d 551, 457 N.Y.S.2d 27 (1982) (overturning injunctive restrictions on demonstrating in public area outside abortion business); *Planned Parenthood of Monmouth County v. Cannizzaro*, 204 N.J. Super. 531, 543, 499 A.2d 535, 542 (Ch. Div. 1985) ("defendants may picket on the sidewalks abutting the property of the Plaintiff"), *aff'd*, 217 N.J. Super. 623, 526 A.2d 741 (App. Div. 1987) (per curiam). Even those state courts that have permitted number and place restrictions have overwhelmingly declined to uphold *total* bans on peaceful public expression. *See Hirsh v. City of Atlanta*, 261 Ga. 22, ——, 401 S.E.2d 530, 533 (First Amendment requires construing injunction to permit up to twenty demonstrators within 50 feet of property line of abortion business), *cert. denied*, 111 S. Ct. 2836, 112 S. Ct. 75 (1991); *Planned Parenthood Ass'n of Cincinnati, Inc. v. Project Jericho*, 52 Ohio St. 3d 56, ——, 556 N.E.2d 157, 162 (1990) (one picket allowed on one sidewalk, four on another sidewalk, and no limits on a third sidewalk); *Crozer Chester Medical Center v. May*, 352 Pa. Super. 51, —— n.4, 506 A.2d 1377, 1379 n.4 (1986) (injunction allowed up to ten pickets). *See also Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W.2d 401, 407 n.1, 409 (N.D. 1992) (injunction provided that "two people may quietly and peacefully picket such facility"; state supreme court overturned this limitation as too restrictive).

The decision of the court below flies in the face of all these decisions.[4]

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[4] Three anomalous state court decisions uphold injunctive speech-free zones outside abortion businesses. Two of these decisions are currently pending on review before the respective state supreme courts. *See Bering v. SHARE*, 106 Wash. 2d 212, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050 (1987); *Planned Parenthood*

B. Ban on "Approaching" Aware Patrons Unless They "Indicate a Desire to Communicate"

The decision of the Supreme Court of Florida upholding a ban on "approaching" people unless they indicate a "desire to communicate" is in direct conflict with decisions of the U.S. Court of Appeals for the Eighth Circuit and the Supreme Court of North Dakota.

The court below upheld an injunction which, within 300 feet of Aware, forbids "approaching" anyone seeking the services of Aware "unless such person indicates a desire to communicate." Thus, the would-be speaker is silenced *unless the desired audience first initiates the communication.*

The Eighth Circuit and the Supreme Court of North Dakota have already overturned restrictions on speaking, in public places, to someone *who has expressed a desire not to comunicate. See United Food and Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422, 432 (8th Cir. 1988) (overturning ban on "persisting in talking to or communicating in any manner with" a person or persons "against his, her or their will" in order to persuade that person or persons to quit or refrain from seeking certain employment: "as written this clause plainly runs afoul of the First Amendment"); *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W.2d 401, 407 n.1, 411 (N.D. 1992) (overturning injunctive bans on speaking to those "who indicate that they do not wish to be spoken to" and leafletting those who indicate "that such person does not wish to receive such literature").

The decision below goes to the opposite extreme, silencing speech even when the audience has not indicated any unwillingness to receive the proffered message.

Shasta-Diablo, Inc. v. Williams, 12 Cal. App. 4th 1817, 16 Cal. Rptr. 2d 540, *review granted*, 851 P.2d 774, 19 Cal. Rptr. 2d 492 (Cal. 1993); *Horizon Health Center v. Felicissimo*, 263 N.J. Super. 200, 622 A.2d 891 (App. Div. 1993), *certif. granted*, No. 36,728 (N.J. July 15, 1993).

C. Ban on Coming Within 300 Feet of Certain Residences

The decision of the Supreme Court of Florida to uphold residential "speech-free zones"—banning all "approaching, congregating, picketing, patrolling, demonstrating" within 300 feet of the residence of any staff, owners or agents of Aware—conflicts with the decisions of the supreme courts of Kansas, Rhode Island, and Texas.

In *Frisby v. Schultz,* 487 U.S. 474 (1988), this Court held that residential picketing rests at the core of the first amendment. *Id.* at 479. While holding that a municipality may ban "focused picketing taking place solely in front of a particular residence," *id.* at 483, this Court reaffirmed the constitutional protection afforded to expressive activities like marching, leafletting, and soliciting in residential neighborhoods, *id.* at 486. A ban on single-residence picketing thus fits within a very narrow exception.

The state supreme courts of Rhode Island and Kansas have followed the teaching of *Frisby.* In order to avoid constitutional difficulties, these courts each construed ordinances, which forbade residential picketing, to ban only picketing confined to the front of a single residence. *See Town of Barrington v. Blake,* 568 A.2d 1015, 1021 (R.I. 1990); *City of Prairie Village v. Hogan,* —— Kan. ——, 855 P.2d 949 (1993) (ordinance applied to both residences and churches).

The Supreme Court of Texas, likewise heeding *Frisby*'s holding that residential picketing is core first amendment activity, overturned an injunction against picketing within 400 feet of the center of the lot of an abortionist's residence. *Valenzuela v. Aquino,* 853 S.W.2d 512, 513 (Tex. 1993). The court held that in the absence of either an ordinance or some specific tortious conduct, the injunction was improper: residential picketing, even

focused, single-residence picketing, is not *per se* unlawful. *Id.* at 513-14.

By contrast, the Supreme Court of Florida in the case at bar forbade petitioners from merely setting foot—even for purposes of peaceful leafletting or while passing by on an extended march route—within 300 feet of the residences of Aware personnel.

III. THE DECISION OF THE SUPREME COURT OF FLORIDA DIRECTLY CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT.

The decision below flies squarely in the face of the governing precedents of this Court.

A. Doctrine of Prior Restraints

The Supreme Court of Florida held that an injunction forbidding picketing, leafleting, verbal speech, and other expressive activity is not a "prior restraint" unless it is content-based. This holding directly conflicts with the decisions of this Court.

"Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints." *Alexander v. United States,* 113 S. Ct. 2766, 2771 (1993) (citation omitted). An injunction need not restrict the content of the enjoined expression in order to qualify as a prior restraint. In *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971), this Court struck down an injunction that forbade " 'passing out pamphlets, leafllets or literature *of any kind,* and from picketing,' " *id.* at 417 (emphasis added; quoting injunction), calling the order a "prior restraint," *id.* at 419. In *Carroll v. President of Princess Anne,* 393 U.S. 175 (1968), this Court struck down an injunction that forbade " 'holding rallies or meetings . . . which will tend to disturb and endanger the citizens of the County and . . . from using . . . any . . .

sound making or producing device thereby disturbing the tranquility of the populace of the County,' " *id.* at 177 n.3 (quoting order); again, this Court analyzed the injunction as a prior restraint, *id.* at 181. Indeed, the seminal prior restraint case of *Near v. Minnesota,* 283 U.S. 697 (1931), invalidated a court order which forbade *all* future publication of a newspaper, *id.* at 713.

The decision of the court below is therefore flatly inconsistent with the decisions of this Court applying the doctrine of prior restraints.

B. Speech-Free Zone Surrounding Aware

The Supreme Court of Florida upheld the injunctive creation of a speech-free zone, extending out 36 feet on three sides and five feet on the fourth side, surrounding the Aware abortion business.

This Court, by contrast, has never tolerated the creation of speech-free zones, whether outside of a business, *Thornhill v. Alabama,* 310 U.S. 88 (1940) (ban on picketing outside premises of business unconstitutional), a courthouse, *United States v. Grace,* 461 U.S. 171 (1983) (ban on display of sign or banner on sidewalk surrounding Supreme Court unconstitutional), a school, *Grayned v. City of Rockford,* 408 U.S. 104, 119 (1972) (ban on peaceful picketing on sidewalk outside school would be unconstitutional), or an embassy, *Boos v. Barry,* 485 U.S. 312, 333 (1988) (construing statute narrowly to permit peaceful congregations within 500 feet of embassies). Even in the unique context of the home, only a ban on physically targeted, single-residence picketing is permissible (as opposed to transient leafletting, solicitation, and marching), *Frisby v. Schultz,* 487 U.S. 474 (1988).

The court below disregarded established constitutional doctrine by holding that the "privacy" of abortion businesses is somehow more sacrosanct than that of any other

premises—even the home. Slip op. at 18, 20 (App. 16a, 17a).

C. Speech-Free Zone Surrounding Residences

The Supreme Court of Florida upheld the injunctive creation of speech-free zones surrounding the residences of Aware owners, staff and agents. Petitioners may not set foot within 300 feet of these residences.

This decision conflicts with the precedents of this Court governing expressive activities in residential areas. These precedents have long recognized constitutional protection for a variety of methods of expression in residential settings. *See, e.g., Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971) (residential leafletting); *Martin v. Struthers,* 319 U.S. 141 (1943) (door-to-door literature distribution); *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620 (1980) (door-to-door solicitation); *Cantwell v. Connecticut,* 310 U.S. 296 (1940) (religious advocacy door-to-door and on residential ways); *Gregory v. City of Chicago,* 394 U.S. 111 (1969) (marching around residential block). While a municipality may forbid "focused picketing taking place solely in front of a particular residence," *Frisby v. Schultz,* 487 U.S. 474, 483 (1988), more sweeping bans are unconstitutional, *id.* at 486.

The present injunction exceeds *Frisby*—and thus runs counter to this Court's established precedents—in at least two respects. First, by pushing demonstrators 300 feet away from a given residence, the injunction goes far beyond a ban on single-residence picketing. Second, by creating an absolute "no entry" zone, the injunction bans not only the *lingering* presence at issue in *Frisby* but also the *transient* presence characteristic of marching, leafletting, and door-to-door canvassing. *Frisby* did not permit municipalities to erect impenetrable speech-free zones.

D. Ban on "Encouraging" Others to Act

The Supreme Court of Florida upheld an injunctive ban on merely "encouraging . . . other persons to commit any of the acts listed herein." This is flatly inconsistent with the decisions of this Court.

It is well settled that the mere *advocacy* of unlawful conduct is within the scope of the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927-28 (1982); *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969) (per curiam); *Noto v. United States*, 367 U.S. 290, 297-98 (1961); *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973) (per curiam). Government may only forbid speech which is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *NAACP v. Claiborne Hardware*, 458 U.S. at 928. A ban on simply "encouraging" action cuts directly into protected advocacy.

E. Vagueness and Overbreadth

The decision of the court below also conflicts with the decisions of this Court invalidating vague and overbroad restrictions on speech. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (vagueness); *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 801 (1988) ("precision of regulation" must be the "touchstone").

The injunction at issue here is vague and overbroad in many respects. Particularly notable is the ban on "sounds or images observable to or within earshot of the patients inside [Aware]." Obviously, a ban on "observable images" and "audible sounds" forbids an enormous range of communicative activity. Furthermore, the contours of this sweeping prohibition are impossible to ascertain with any confidence.[5]

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[5] For example:

(a) Does "observable" mean simply "visible," so that everything in sight is forbidden? Or does "observable" simply mean

Constitutionally deficient as well is the ban on "approaching" a "person seeking the services" of Aware unless such person "indicates a desire to communicate by approaching" the speaker. This ban imposes overbroad restrictions on such classic speech activities as leafletting, solicitation, verbal suasion, and the mere utterance of information to passersby. Compounding this problem is the impossibility of knowing with any confidence who is and is not a "person seeking the services" of Aware and what the term "approaching" includes (standing still? backpedalling? coming how close?).

Other challenged provisions of the injunction (the "speech-free zones" at Aware and at residences and the

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something large enough—or close enough—to be distinguished in detail? If the latter, how large—or close—is enough? How clear must the observation be?

(b) Does "observable to . . . the patients" mean in view from a place where patients normally are? sometimes go? could go?

(c) Does "observable" mean by the person of average visual acuity? by most persons? by any person, near-sighted or far-sighted?

(d) Does the term "images" mean pictures on posters? Does it include words on signs? Symbolic gestures such as kneeling? Can a person be an "image"? When?

(e) Does the term "sounds" include only communications intended to address the abortion issue? Does the term include all communications whatsoever, including greeting a friend? telling a pedestrian that she dropped something? warning children not to cross in traffic? calling directions to a trucker who stops and asks for assistance? Does the term "sounds" include all noises, whether communicative or not, including sneezing, coughing, the crying of a child?

(f) Does "within earshot" mean able to be heard distinctly? barely noticed? noticeable even if not actually noticed?

(g) Under what conditions must the sound be "within earshot"? When traffic is passing? When traffic is still? When the windows in the Aware facility are open? closed? When the air conditioner is operating?

(h) Does "within earshot" refer to the patient of average hearing ability? Most patients? Any patients?

ban on "encouraging" violations of the injunction) likewise suffer from overbreadth. In addition, the terms "encouraging" (in paragraph (9) (App. 33a)) and "approaching" and "demonstrating" (in paragraph (6) (App. 33a)) run afoul of the vagueness doctrine.

The court below nevertheless upheld each of these provisions. This Court should grant review to resolve the conflicts this decision creates with the precedents of this Court.

CONCLUSION

The decision of the Supreme Court of Florida creates multiple conflicts of constitutional law—with the geographically overlapping Eleventh Circuit, with other state and federal courts, and with this Court. Furthermore, the decision suffers from numerous glaring constitutional infirmities.

This Court should grant the present petition for a writ of certiorari.

Respectfully submitted,

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November 24, 1993

APPENDICES

APPENDIX A

SUPREME COURT OF FLORIDA

No. 81,905

OPERATION RESCUE, *et al.*,
Appellant,
vs.
WOMEN'S HEALTH CENTER, *et al.*,
Appellees.

[October 28, 1993]

PER CURIAM:

We have for review a trial court order imposing an amended permanent injunction. The order has been certified by the district court as passing on an issue of great public importance requiring immediate resolution by this Court. We have jurisdiction. Art. V, § 3(b)(5), Fla. Const. We approve the order.

I. FACTS

Women's Health Center (Health Center) filed suit against Operation Rescue and others (Operation Rescue) seeking an injunction prohibiting that organization from engaging in certain activities against the Aware Woman Center for Choice (Clinic) in Melbourne, its patients, and staff. The court entered an order on October 25, 1991, granting a temporary injunction that imposed a number of restrictions.[1] Pursuant to the Health Center's request

[1] The temporary injunction embraced the following restrictions:

1. All Respondents, the officers, directors, agents, representatives of Respondents, and all other persons, known and un-

for permanent relief, the court directed the parties to submit a stipulation of issues and facts, which the parties did.[2] The court subsequently granted long-term relief,

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known, acting on behalf of any Respondents, or in concert with them, in any manner or by any means, are hereby enjoined and restrained from:

a) trespassing on, sitting on, blocking, or obstructing ingress into or egress from any facility in which abortions are performed or family planning services are provided in the County of Brevard and Seminole, and surrounding counties, State of Florida, of any person seeking access to or leaving those facilities;

b) physically abusing persons entering, leaving, working at or using any services at any facility in which abortions are performed or family planning services are provided, in the County of Brevard and Seminole, and surrounding counties, State of Florida;

c) attempting or directing others to take any of the actions described in paragraphs a) and b);

2. Nothing in this Court's Order should be construed to limit Respondents' exercise of their legitimate First Amendment rights, such as, but not limited to, carrying signs, singing, and praying, in a manner which does not violate a), b) and c) above . . . .

[2] The parties' stipulation included the following:

2. Operation Rescue America, Ed Martin, Judy Madsen and Shirley Hobbs are active in an organization known as "Operation Rescue America." In other areas of the United States, this effort has been directed towards closing down abortion clinics throughout the country to save unborn children. Respondents desire is to close down "abortion mills" by various means. Operation Rescue America, Ed Martin, Judy Madsen and Shirley Hobbs well understand that peacefully blocking access to the facilities might constitute a trespass that is punishable by criminal penalties. They feel a violation of such a criminal statute is justified by their belief that protection of the unborn may merit breaking the criminal trespass laws.

. . . .

6. Respondents have passed out flyers in the Central Florida area stating their desire to close down abortion clinics in this area. One of the flyers states that the demonstrations will be held in the Central Florida area.

[Continued]

entering a permanent injunction nearly a year later, on September 30, 1992, based on a number of findings of fact [3] and imposing several general restrictions.[4]

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[2] [Continued]

7. Respondent Ed Martin has made statements that his desire is to close all abortion clinics in the Central Florida area. Ed Martin has stated to members of press that he would love to shut down all abortion clinics. Ed Martin has issued a press release which states that "the spirit of [massive anti-abortion demonstrations in] Wichita comes to Florida."

[3] The trial court made the following findings of fact:

2. Respondents are individuals and organizations, acting in concert, who have planned a nationwide campaign, which they call "OPERATION RESCUE" (hereinafter, "OPERATION"), directed towards closing down abortion clinics and providers throughout the country. Respondents' own literature states that their intention is to "Physically close down abortion mills" by encircling them with thousands of protesters and blocking access to the facilities. Operation Goliath is dedicated to similar principles.

. . . .

5. Ed Martin and Pat Mahoney have stated an intent to prevent persons from obtaining abortions in the Brevard and Seminole County area by blocking access to clinics.

6. Respondents have passed out flyers in the Central Florida area stating an intent to close down abortion clinics in this area.

7. Respondent, Pat Mahoney, was a leader in the Wichita, Kansas protests. Respondents, Ed Martin and Pat Mahoney, have made statements that there will be or may be a blocking of the entrance to an abortion clinic in the Central Florida area. Pat Mahoney and Martin have stated to members of the press that they intend to shut down a clinic, and have issued a press release which states that "the spirit of Wichita comes to Florida." The press release also contained information that the Reverend Ed Martin of Ocala announces an "Operation Rescue" for Central Florida.

8. Literature obtained from Rescue America states that their members should ignore the law of the State and the police officers who remove them from their blockading positions.

[4] The permanent injunction contained the following general restrictions:

Nearly six months later, after taking evidence and listening to extensive live testimony in a three-day evidentiary hearing, the trial court determined its prior restrictions had proved insufficient "to protect the health, safety and rights of women in Brevard and Seminole County, Florida, and surrounding counties seeking access to [medical and counseling] services." Accordingly, the court on April 8, 1993, amended its prior order, concluding that Operation Rescue was engaging in actions that "impede and obstruct both staff and patients from entering the clinic" based on the following findings of fact:

> A. That despite the injunction of September 30, 1992, there has been interference with ingress to the petitioners' facility known as the Aware Woman Clinic located on the northwest corner of U.S. Highway One and Dixie Way in the City of Melbourne, Brevard County, Florida. The interference to ingress has taken the form of persons on the paved portions of Dixie Way, some standing without any obvious relationship to others; some moving about, again without any obvious relationship to others; some holding signs, some not; some approaching, apparently

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A. Respondents, OPERATION RESCUE . . . are hereby enjoined from:

1. trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from any facility at which abortions are performed in Brevard and Seminole County, Florida;

2. physically abusing persons entering, leaving, working or using any services of any facility at which abortions are performed in Brevard and Seminole County, Florida; and,

3. attempting or directing others to take any of the actions described in Paragraphs 1 and 2 above.

B. Nothing in this Court's Order should be construed to limit Respondents' exercise of their legitimate First Amendment rights, such as, but not limited to, carrying signs, singing, and praying, in a manner which does not violate [paragraphs] 1, 2, and 3 above . . . .

trying to communicate with the occupants of motor vehicles moving on the paved surface; some marching in a circular picket line that traversed the entrance driveways to the two parking lots of the petitioners and the short section of sidewalk joining the two parking lots and then entering the paved portion of the north lane of Dixie Way and returning in the opposite direction. Other persons would be standing, kneeling and sitting on the unpaved shoulders of the public right-of-way. As vehicular traffic approached the area it would, in response to the congestion, slow down. If the destination of such traffic was either of the two parking lots of the petitioners, such traffic slowed even more, sometimes having to momentarily hesitate or stop until persons in the driveway moved out of the way.

B. The number of people on any one day would vary from a handful to a crowd of four hundred. . . . The frequency with which persons would appear at this location would range from once a week to three times a week with the largest gatherings usually on Saturdays.

C. Associated with such gatherings would be noise emanating from singing, chanting, whistling, loudspeakers . . . and occasional bullhorns. . . .

. . .

E. As traffic slowed on Dixie Way and began its turn into the clinic's driveway, the vehicle would be approached by persons designated by the respondents as sidewalk counselors attempting to get the attention of the vehicles' occupants to give them anti-abortion literature and to urge them not to use the clinic's services. Such so-called sidewalk counselors were assisted in accomplishing their approach to the vehicle by the hesitation or momentary stopping caused by the time needed for the picket line to open up before the vehicle could enter the parking lot.

The court noted that in addition to activities outside the Clinic, Operation Rescue had implemented a "blockade" of the Clinic's telephone system, jamming its lines with multiple simultaneous calls and making it impossible for Clinic staff to summon emergency medical aid:

> 2. . . . [R]epeated, nearly simultaneous, multiple telephone calls are made to the clinic, jamming its telephone lines. The jamming of the clinic's telephone system, makes it impossible for clinic staff to summon an ambulance to transfer any patient to the hospital should an emergency arise.

Further, Operation Rescue had approached the private residences of Clinic patients, employees, and staff, at times confronting employees' young children home alone while their parents worked:

> G. On other occasions since the entry of the injunction on September 30, 1992, the respondent, Cadle, and others in concert with him approached the private residences or temporary lodging places of clinic employees. These approaches included not only direct communication with the occupants (sometimes the "home alone," minor children of the occupants), but also carrying signs, walking up and down on the sidewalk or street in front of the residence, shouting at passers-by, contacting (ringing doorbells of) neighbors, and providing literature identifying the clinic employee as a "baby killer."
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> H. On one occasion the respondent, Cadle, with others went to the vicinity of the motel where a staff physician was temporarily staying and demonstrated. While respondent, Cadle, remained outside just off the premises of the motel, others went upon the premises of the motel, some entering the motel lobby, yelling "child murderer" and "baby killer" . . . .
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> . . . .

1. That license tag numbers of the clinic's patients are recorded by the respondents or persons in concert with them and then are traced through state records to obtain the home address of such persons who are subsequently contacted by the respondents.

And finally, Operation Rescue had threatened violence against Clinic patients, employees, and staff:

F. . . . On one occasion the communication to a clinic staff person took the form of an attempt to invoke the wrath of God by shouting, "I pray that God strikes you dead now!"

. . . .

J. On another occasion the doctor was followed as he left the clinic by a person associated with the respondents who communicated his anger to the doctor by pretending to shoot him from the adjoining vehicle. As a result of the foregoing demonstrations and activities, and after a physician similarly employed was killed by an antiabortionist at a clinic in North Florida, this doctor terminated his employment with the clinic.

. . . .

3. That patients and staff are sometimes followed in a stalking manner when they leave the clinic, giving such persons a feeling of great apprehension.

The doctor who ultimately terminated his employment with the Clinic as the result of Operation Rescue's tactics testified at the evidentiary hearing concerning the adverse medical impact of those tactics on Clinic patients:

I. . . . As a result of patients having to run such a gauntlet, the patients manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures. The doctor also testi-

fied that the noise of singing, chanting, shouting and yelling could be heard through the walls of the clinic and caused stress in the patients during surgical procedures and while recuperating in the recovery rooms. The doctor also testified that he observed some patients turn away from the crowd in the driveway to return at a later date. He testified that such delay in undergoing the procedures also increased the risk associated therewith.

Based on Operation Rescue's continued "interference with ingress to the [Clinic]," the trial court amended the general prohibitions of the permanent injunction to prohibit Operation Rescue from engaging in the following specific acts:

> (1) at all times on all days, from entering the premises and property of the Aware Woman Center for Choice . . .
>
> (2) At all times on all days, from blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of the Clinic.
>
> (3) At all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way or private property within thirty-six (36) feet of the property line of the Clinic . . . . An exception to the 36 foot buffer zone is the area immediately adjacent to the Clinic on the east . . . . The respondents must remain at least five (5) feet from the Clinic's east line. . . .
>
> (4) During the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic.

(5) At all times on all days, in an area within three-hundred (300) feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the respondents. . . .

(6) At all times on all days, from approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within three-hundred (300) feet of the residence of any of the petitioners' employees, staff, owners or agents, or blocking or attempting to block, barricade, or in any other manner temporarily or otherwise, obstruct the entrances, exits or driveways of the residences of any of the petitioners' employees, staff, owners or agents. The respondents and those acting in concert with them are prohibited from inhibiting or impeding or attempting to impede, temporarily or otherwise, the free ingress or egress of persons to any street that provides the sole access to the streets on which those residences are located.

(7) At all times on all days, from physically abusing, grabbing, intimidating, harassing or assaulting persons entering or leaving, working at or using services at the petitioners' Clinic or trying to gain access to, or leave, any of the homes of owners, staff or patients of the Clinic.

(8) At all times on all days, from harassing, intimidating or physically abusing, assaulting or threatening any present or former doctor, health care professional, or other staff member, employee or volunteer who assists in providing services at the petitioners' Clinic.

a. Law enforcement officers and Southern Bell Telephone Company are authorized, upon request of the Clinic owners to place a trap on the telephone

> lines of the Aware Woman Center in order to identify those persons engaged in a phone blockade and jamming of the Clinic's phone lines . . . .

Operation Rescue appealed the order granting the amended permanent injunction and the Fifth District Court of Appeal certified the trial court's order as passing on a matter of great public importance requiring immediate resolution by this Court.

II. LEGAL ISSUES

Operation Rescue challenges the propriety of only the amended permanent injunction, raising numerous issues under the United States Constitution: The amended injunction violates freedom of speech, freedom of association, equal protection, and the free exercise of religion.[5]

A. Standard of Review

In order for a permanent injunction to issue in a proceeding such as this, the petitioner must initially satisfy certain technical requirements:

> First, the plaintiff must demonstrate that the court's exercise of equity jurisdiction is proper. [In other words, the plaintiff must show that he or she has no adequate legal remedy; the threatened injury is real, not imagined; and no equitable defenses control.] Second, the plaintiff must actually succeed on the merits of [his or her] claims. Third, the plaintiff must show that the balance of equities tips in favor of injunctive relief.
>
> If an injunction should issue, the court has wide discretion in fashioning an appropriate remedy. But this discretion is constrained by precautionary con-

[5] Although Operation Rescue notes in its brief that the right to free speech is also protected by the Florida Constitution, Operation Rescue makes no separate argument under the Florida charter.

> siderations. The injunction that issues may not be drawn to enjoin all conceivable breaches of the law; it must instead be carefully tailored to remedy only the specific harms shown. It may be no broader than is necessary to restrain the unlawful conduct. The injunction, as drafted, should constitute "the least intrusive remedy that will still be effective."

Northeast Women's Center, Inc. v. McMonagle, 665 F. Supp. 1147, 1152-53 (E.D. Pa. 1987) (citations omitted), *affirmed in part,* 868 F.2d 1342 (3d Cir.), *cert. denied,* 110 S. Ct. 261, 107 L. Ed. 2d 210 (1989).

Where an injunction is issued and challenged, Florida's appellate courts possess express authority to review the order. Fla. R. App. P. 9.130(a)(3)(B). The scope of review, however, is limited. As a general rule, trial court orders are clothed with a presumption of correctness and will remain undisturbed unless the petitioning party can show reversible error. *Applegate v. Barnett Bank,* 377 So. 2d 1150 (Fla. 1979). To the extent it rests on factual matters, an order imposing a permanent injunction lies within the sound discretion of the trial court and will be affirmed absent a showing of abuse of discretion. *See, e.g., Bailey v. Christo,* 453 So. 2d 1134 (Fla. 1st DCA 1984), *review denied,* 461 So. 2d 113 (Fla. 1985). This is particulary true where the order relies on live testimony or other evidence that the trial court is singularly well-suited to evaluate. Abuse of discretion, of course, is judged by the general "reasonableness" standard:

> In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion.

> The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonabelness.

Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). To the extent it rests on purely legal matters, an order imposing an injunction is subject to full, or de novo, review on appeal.

In the present case, Operation Rescue does not seriously question the technical validity of the amended injunction or the factual findings on which it is based. Our own review of the record shows that the order meets the "reasonableness" test for technical validity and that competent, substantial evidence supports the court's factual findings. Accordingly, we take as true the trial court's facts for purposes of evaluating Operation Rescue's constitutional claims.

B. Free Speech

Operation Rescue claims that the amended injunction violates the Free Speech Clause of the First Amendment of the United States Constitution because it completely bans religious speech in a traditional public forum, is not the least restrictive means of achieving the government interest, does not leave open ample alternative means of communication, and constitutes an impermissible prior restraint on free speech.

The present amended injunction undeniably operates at the core of the First Amendment because it regulates picketing and other activities on an issue of public concern and courts "have traditionally subjected [such] restrictions on public issue [expression] to careful scrutiny." *Frisby v. Schultz*, 487 U.S. 474, 479, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988). Nonetheless, "[e]ven protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Gov-

ernment property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 799-800, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985).

1. Traditional public forum

To determine whether or to what extent limits may be placed on protected speech, the United States Supreme Court has generally focused on the place, or "forum," where the citizen seeks to speak. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983). The federal Court has identified three types of First Amendment fora, "the traditional public forum, the public forum created by government designation, and the nonpublic forum," and has tailored an analysis for each. *Cornelius*, 473 U.S. at 802.

The forum at issue in the present case consists of public streets, sidewalks, and rights-of-way, which—as the present parties agree—constitute a traditional public forum. *See Frisby*, 487 U.S. at 480. The relevant inquiry in such a case is multi-step and depends initially on whether the restriction is content-based or content-neutral:

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state inter-

> est and that it is narrowly drawn to achieve that end. The State may also enforce regulations of time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Perry, 460 U.S. at 45 (quoting *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515, 59 S. Ct. 954, 83 L. Ed. 1423 (1939).

2. Content-neutral

Operation Rescue claims that the time, place, and manner restrictions at issue here are content-based and thus subject to the more stringent test noted above in *Perry*. We disagree. The restrictions regulate when, where, and how Operation Rescue may speak, not what it may say. The restrictions make no mention whatsoever of abortion or any other political or social issue; they address only the volume, timing, location, and violent or harassing nature of Operation Rescue's expressive activity.

> In fact, the injunction could apply equally to protests which supported abortion as well as to protests which opposed abortion, or indeed, to protests supporting or opposing any other cause. It is true that this injunction applies only to [these particular abortion opponents], but that is because it is only those persons who the Center has proved have created and are continuing to create a threat of violence and intimidation.

Northeast Women's Center, Inc. v. McMonagle, 939 F.2d 57, 63 (3rd Cir. 1991). Because the restrictions are content-neutral, we proceed to decide whether they are "narrowly-tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry*, 460 U.S. at 45.

3. Government interests

Operation Rescue claims that no significant government interest is implicated. We disagree. Numerous

government interests, all of which rise to the level of "significant" or higher, are apparent. Our state has a strong interest in protecting the constitutional rights, both state and federal, express and implied, of all Florida's citizens, including its women. A woman's freedom to seek lawful medical or counseling services in connection with her pregnancy constitutes a clear personal right under both our state and federal constitutions. See *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973); *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989). Our state also has strong interests in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting property rights of all Florida's citizens.

The United States Supreme Court delineated an additional government interest in *Frisby v. Schultz*, 487 U.S. 474, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988), wherein the Court addressed the issue of picketers demonstrating outside the home of an abortion clinic doctor in violation of a city ordinance banning all residential picketing. The Court, in upholding the ordinance, noted that "the protection of residential privacy" constitutes "a significant government interest" and that "[o]ne important aspect of residential privacy is protection of the unwilling listener." *Id.* at 484.

> Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. "That we are often captives outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere." Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.

Id. at 484-85 (citations omitted) (quoting *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970)). We conclude that the reasoning underlying this government interest in residential privacy applies even more convincingly to the state interest in ensuring medical privacy. Florida citizens are entitled to both unimpeded access to licensed medical facilities and freedom from unwanted confrontations and communications when undergoing lawful medical treatment, particularly where the effect of such confrontations is to place the patient's health and safety in jeopardy.

4. Narrowly tailored

Operation Rescue contends that the restrictions are not narrowly tailored, but rather operate as a complete ban on all religious and pro-life picketing outside the Clinic and homes of Clinic workers. We disagree. In sum, the amended injunction bans Operation Rescue from entering or blocking access to the Clinic, demonstrating within five feet of Clinic property on one side of the Clinic and thirty-six feet on the other three sides, making loud noises during surgery hours, approaching Clinic patients within three hundred feet of Clinic property unless invited, demonstrating within three hundred feet of the homes of Clinic workers, or engaging in violent or threatening acts against Clinic workers or patients. The trial court found as a factual matter that each of these restrictions is necessary to counteract specfic abuses Operation Rescue fomented after entry of the permanent injunction nearly six months earlier. As noted above, competent, substantial evidence supports all the trial court's factual findings, including its determination that Operation Rescue engaged in impermissible activities, and Operation Rescue does not now contend otherwise.

The type of focused picketing banned from the buffer zone around the Clinic and residences differs fundamentally from the type of generally disseminated communication that cannot be completely banned in public places,

such as handbilling and solicitation. Here, the picketing is directed at particular Clinic workers and patients, not the public at large. The United States Supreme Court has noted the difference between targeted and general picketing and described the invidious effect of this type of targeted picketing by those opposed to abortion:

> The type of picketers [i.e., abortion opponents outside a doctor's home] banned by the [restriction] generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt . . . .
>
> . . . .
>
> The First Amendment permits the government to prohibit offensive speech as intrusive when the "captive" audience cannot avoid the objectionable speech. The target of the focused picketing banned by the [restriction] is just such a "captive." The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech. Thus, the "evil" of targeted residential picketing, "the very presence of an unwelcome visitor at the home, is created by the medium of expression itself." Accordingly, the [restriction's] complete ban of that particular medium of expression is narrowly tailored.

Frisby, 487 U.S. at 486-88 (citations omitted). The above reasoning applies with even greater force where the object of targeted picketing is the medical patient seeking treatment, rather than the home-dweller. While targeted picketing of the home threatens the psychologi-

cal well-being of the "captive" resident, targeted picketing of the hospital or clinic threatens not only the psychological but the physical well-being of the patient held "captive" by medical circumstance. This is amply demonstrated by the trial court's findings in the present case.

We note that while the trial court might perhaps have achieved its goal through use of a slightly narrow buffer zone around the Clinic and workers' residences, or perhaps by allowing a solitary picketer within the buffer zone as a symbolic gesture,[3] this Court will not sit as trier-of-fact and make incremental changes in the trial court's order, particularly where the restrictions were necessitated by clear abuse. In short, we "decline to entertain quibbling over a few feet" or over purely symbolic matters. *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 P.2d 681, 686 (9th Cir. 1988). The amendments accordingly are sufficiently narrowly tailored to protect significant government interests.

5. Alternative means of communication

As its last point under the *Perry* standard, Operation Rescue claims that the restrictions do not leave open ample alternative means of communication. We point out, however, that Operation Rescue may at all times engage in expressive activity in the vicinity of the Clinic. In fact, Operation Rescue is entirely free to do the following at any time on any day: place an unrestricted number of picketers along the south edge of Dixie Way and both the east and west edge of U.S. 1, engage in singing, chanting, and whistling, as long as it cannot be heard inside the Clinic during the designated times; engage in "sidewalk counseling" of any Clinic patient who invites contact outside the five-foot and thirty-six-foot buffer zones; and picket in the neighborhoods of Clinic workers outside the

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[3] *But see Frisby v. Schultz*, 487 U.S. 474, 487, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988) ("But the actual size of the group is irrelevant; even a solitary picket can invade residential privacy.")

three-hundred-foot buffer zone. Dixie Way is only twenty-one feet wide in the area of the Clinic and for all practical purposes Operation Rescue will be able to convey its message just as effectively from the south side of the road as the north. In fact, on the south side, its picketers will be in closer proximity to all eastbound traffic and will thus be better-positioned to deliver their message to those drivers and passengers. The only thing Operation Rescue will be unable to do from the south side that it could otherwise do from the north is block ingress to and egress from the Clinic. The amended injunction thus leaves open ample alternative means of communication for those who object to the Clinic's activities.

6. Prior restraint

As its last point under the Free Speech Clause, Operation Rescue claims that the injunction operates as an unconstitutional prior restraint on protected speech. The doctrine of prior restraint applies to content-based restrictions on speech prior to its occurrence. *See Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57 (3rd Cir. 1991); *Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue*, 550 N.E. 2d 1361 (Mass. 1990). As explained above, however, the present injunction is content-neutral.

C. Vagueness and Overbreadth

Operation Rescue claims that the following restrictions are both unconstitutionally vague and overbroad: the ban on "sounds or images observable to or within earshot of the patients inside the Clinic," the ban on "physically approaching any person seeking the services of the Clinic" within three hundred feet of the Clinic, and the ban on demonstrating within three hundred feet of workers' residences.

The United States Supreme Court has explained the doctrine of "vagueness":

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of those freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) (footnotes omitted). In sum, a government restriction is vague if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.,* 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926).

We conclude that the ban on "sounds or images observable to or within earshot of the patients inside the Clinic" is sufficiently specific to put Operation Rescue on notice that loud noises may not be made and signs depicting patients' names or other images may not be displayed from ladders above the Clinic fence in such a manner that they would be observable to patients within the Clinic

during surgery and recovery periods. *See Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57, 72 (3rd Cir. 1991) (injunction containing identical ban on "sounds or images observable to or within earshot of patients inside the Center" upheld). Similarly, the restrictions concerning "physically approaching" Clinic patients and demonstrating within three hundred feet of workers' homes are constitutionally sound. Each restriction was fashioned to combat a specific abuse and each provides reasonable notice that those particular abuses will no longer be tolerated. "Condemned to the use of words, we can never expect mathematical certainty from our language. The words of the [ban] are marked by "flexibility and reasonable breadth, rather than meticulous specificity," [and] we think it is clear what the [ban] as a whole prohibits." *Grayned*, 408 U.S. at 110 (citations and footnotes omitted). "We thus are unable to disagree with the [trial] court's conclusion that the terms of the [ban] are not so indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Medlin v. Palmer*, 874 F.2d 1085, 1091 (5th Cir. 1989).

As to overbreadth, the United States Supreme Court has noted that "[a] clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct. . . . The crucial question, then, is whether the [ban] sweeps within its prohibitions what may not be punished under the First . . . Amendment[]." 408 U.S. at 114-15. Operation Rescue claims that the above restrictions are overbroad in that they ban protected activities and reach individuals and groups not responsible for disruptive conduct. We have discussed the first concern already and have concluded that the amended injunction is narrowly tailored to achieve its purpose. As to the second, we note that the injunction tracks the language of Florida Rule of Civil Procedure 1.160(c), which provides that "[e]very injunction shall . . . be binding on the parties to the action, their officers,

agents, servants, employees, and attorneys and on those persons in active concert or participation with them who receive actual notice of the injunction." Given this limitation on the injunction's reach, we find no danger that the ban will be unfairly enforced against persons who have no notice or knowledge of the injunction's existence. *See Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988).[7]

III. CONCLUSION

Richard Grayned was convicted for participating in a demonstration in 1969 outside West Senior High School in Rockford, Illinois, protesting the school's lack of African-American programs. The city ordinance under which he was convicted forbade any "noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof." *Grayned v. City of Rockford*, 408 U.S. 104, 107-08, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). In a key case on First Amendment rights, the United States Supreme Court upheld the conviction and ordinance, with Justice Marshall writing for the Court:

> The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." Although a silent vigil may not unduly interfere with a public library, making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.

Id. at 116 (citation and footnote omitted). Justice Marshall went on to note that "schools could hardly tolerate boisterous demonstrators who drown out class-

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[7] We find the remainder of Operation Rescue's constitutional claims to be without merit.

room conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse." *Id.* at 119. In other words, the First Amendment must yield when protected speech substantially interferes with the normal functioning of a public or private place.

This rule is particularly apt in the present case, where demonstrators' tactics have impaired the functioning not of a school but a licensed medical facility and have placed in jeopardy the health, safety, and rights of Florida women. Operation Rescue has formally stipulated that its program is "directed towards closing down abortion clinics." This philosophy and the organization's past tactics are clearly "incompatible with the normal activity of [this] particular place." *Grayned*, 408 U.S. at 116.[8]

We hold the restrictions contained in the amended permanent injunction constitutional in light of the medical services provided the Clinic and Operation Rescue's past conduct. While the First Amendment confers on each citizen a powerful right to express oneself, it gives the picketer no boon to jeopardize the health, safety, and rights of others. No citizen has a right to insert a foot in the hospital or clinic door and insist on being heard—while purposefully blocking the door to those in genuine need of medical services. No picketer can force speech into the captive ear of the unwilling and disabled.

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[8] Operation Rescue's reliance on *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982), to support its Free Speech claims is misplaced. There, the United States Supreme Court ruled that the First Amendment bars Mississippi courts from imposing damages liability in favor of white merchants against individuals and civil rights organizations for lost earnings stemming from a black boycott of white businesses during the 1960's. Although state courts had originally granted injunctive relief to the merchants, the injunction issue became moot when the boycott was voluntarily lifted and was not addressed at all by the federal Court. The propriety of the injunction in the present case, on the other hand, is the sole issue before this Court—no party even claims that the Health Center is entitled to damages for Operation Rescue's actions.

Our holding is consistent with the vast weight of both federal and state caselaw, wherein courts have upheld virtually all the present restrictions under similar circumstances.[9]

Based on the foregoing, we approve the trial court's order imposing the amended permanent injunction. A full copy of the amended injunction is appended to this opinion.[10]

It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concurs.

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[9] *See, e.g., Frisby v. Schultz,* 487 U.S. 474, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988) (ordinance imposing blanket ban on targeted residential picketing constitutional where abortion opponents had demonstrated outside doctor's home); *Northeast Women's Center, Inc. v. McMonagle,* 939 F.2d 57 (3rd Cir. 1991) (injunction containing language virtually identical to that in the present case held constitutional where read as creating 500 foot buffer zone around clinic and workers' homes); *Medlin v. Palmer,* 874 F.2d 1085 (5th Cir. 1989) (ordinance banning use of bullhorns and loudspeakers within 150 feet of medical clinic upheld against challenge by abortion opponents); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.,* 859 F.2d 681 (9th Cir. 1988) (injunction limiting picketing outside abortion clinic upheld when read as banning noise that "substantially interferes with the provision of medical services within the Clinic, including counseling"); *Hirsh v. City of Atlanta,* 401 S.E.2d 530 (Ga.) (injunction limiting demonstrations outside abortion clinic upheld), *cert. denied,* 112 S. Ct. 75, 116 L. Ed. 2d 49 (1991); *Planned Parenthood v. Operation Rescue,* 550 N.E.2d 1361 (Mass. 1990) (injunction limiting demonstrations outside abortion clinic upheld); *Bering v. Share,* 721 P.2d 918 (Wash. 1986) (injunction limiting demonstrations outside abortion clinic upheld), *cert. dismissed,* 479 U.S. 1050, 107 S. Ct. 940, 93 L. Ed. 2d 990 (1987).

[10] We recognize that a panel of the United States Court of Appeals for the Eleventh Circuit has recently ruled that the federal district court erred in denying an abortion opponent's request for relief from the above injunction. *See Chaffer v. McGregor,* No. 93-2407 (11th Cir. Oct. 20, 1993).

APPENDIX B

IN THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

Case No.: 91-2811-CA-16-K

WOMEN'S HEALTH CENTER, INC.,
AWARE WOMAN CENTER FOR CHOICE, INC., *et al.*,
Petitioners,

vs.

OPERATION RESCUE, OPERATION RESCUE AMERICA,
OPERATION GOLIATH, ED MARTIN, BRUCE CADLE, *et al.*,
Respondents.

AMENDED PERMANENT INJUNCTION

THIS CAUSE came before the court for hearing on the motion of petitioners for sanctions and modification of the permanent injunction entered by this court, (The Honorable Wallace H. Hall), dated September 30, 1992, and the court having taken three days of testimony and having carefully considered the evidence and the legal arguments makes the following findings:

A. That despite the injunction of September 30, 1992, there has been interference with ingress to the petitioners' facility known as the Aware Woman Clinic located on the northwest corner of U.S. Highway One and Dixie Way in the City of Melbourne, Brevard County, Florida. The interference to ingress has taken the form of persons on the paved portions of Dixie Way, some standing without any obvious relationship to others; some moving about, again without any obvious relationship to others; some holding signs, some not; some approaching, apparently

trying to communicate with the occupants of motor vehicles moving on the paved surface; some marching in a circular picket line that traversed the entrance driveways to the two parking lots of the petitioners and the short section of sidewalk joining the two parking lots and then entering the paved portion of the north lane of Dixie Way and returning in the opposite direction. (See drawing attached.) Other persons would be standing, kneeling and sitting on the unpaved shoulders of the public right-of-way. As vehicular traffic approached the area it would, in response to the congestion, slow down. If the destination of such traffic was either of the two parking lots of the petitioners, such traffic slowed even more, sometimes having to momentarily hesitate or stop until persons in the driveway moved out of the way.

B. The number of people on any one day would vary from a handful to a crowd of four hundred. The composition of the crowd would include some of the named respondents in this cause; some persons who were loosely associated with the respondents' organizations, Operation Rescue and Operation Goliath; some who were present in support of the clinic (pro-choice); some law enforcement officers engaging in crowd and traffic control (from five officers on light days to as many as fifty officers on other days); and some representatives of the print and television media. The frequency with which persons would appear at this location would range from once a week to three times a week with the largest gatherings usually on Saturdays.

C. Associated with such gatherings would be noise emanating from singing, chanting, whistling, loudspeakers on the exterior of the clinic broadcasting music, individual portable radios (boom boxes), and occasional bullhorns. Individuals of the partisan groups would shout and yell at each other, frequently approaching so closely as to be in each other's face trying to out-sound the other, occasionally using boom boxes at full volume as an assist.

D. The Melbourne Police Department officers on the scene on some occasions erected temporary barricades (saw horse type) in an effort to put some distance between the partisan groups. The respondents and those aligned with them, remained primarily in the public right of way (paved and unpaved). The pro choice people would be on the edge of the clinic's lawn and parking lot (private property) but occasionally attempting to share the sidewalk with the opposition. On at least one occasion in order to give more room for people, the police barricaded the north lane of Dixie Way so that two-way vehicular traffic was confined to the single south lane.

E. As traffic slowed on Dixie Day and began its turn into the clinic's driveway, the vehicle would be approached by persons designated by the respondents as sidewalk counselors attempting to get the attention of the vehicles' occupants to give them anti-abortion literature and to urge them not to use the clinic's services. Such so-called sidewalk counselors were assisted in accomplishing their approach to the vehicle by the hesitation or momentary stopping caused by the time needed for the picket line to open up before the vehicle could enter the parking lot.

F. The clinic has fences on its west and north side, and persons would occasionally place a ladder on the outside of the fence and position themselves at an elevation above the fence and attempt to communicate by shouting at persons (staff and patients) entering the clinic. On one occasion the communication to a clinic staff person took the form of an attempt to invoke the wrath of God by shouting, "I pray that God strikes you dead now!".

G. On other occasions since the entry of the injunction on September 30, 1992, the respondent, Cadle, and others in concert with him approached the private residences or temporary lodging places of clinic employees. These approaches included not only direct communication with the occupants (sometimes the "home alone",

minor children of the occupants), but also carrying signs, walking up and down on the sidewalk or street in front of the residence, shouting at passers-by, contacting (ringing doorbells of) neighbors, and providing literature identifying the clinic employee as a "baby killer".

H. On one occasion the respondent, Cadle, with others went to the vicinity of the motel where a staff physcian was temporarily staying and demonstrated. While respondent, Cadle, remained outside just off the premises of the motel, others went upon the premises of the motel, some entering the motel lobby, yelling "child murderer" and "baby killer". The doctor testified that as a result of such activity his departure for the clinic was delayed by one-half hour.

I. The same staff physician testified that on one occasion while he was attempting to enter the parking lot of the clinic, he had to stop his vehicle and remained stopped while respondent, Cadle, and others took their time to get out of the way and while doing so were yelling and screaming at the doctor, "Baby killer"—"We don't want you here in Melbourne." This physician also testified that he witnessed the demonstrators running along side of and in front of patients' vehicles, pushing pamphlets in car windows to persons who had not indicated any interest in such literature. As a result of patients having to run such a gauntlet, the patients manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures. The doctor also testified that the noise of singing, chanting, shouting and yelling could be heard through the walls of the clinic and caused stress in the patients during surgical procedures and while recuperating in the recovery rooms. The doctor also testified that he observed some patients turn away from the crowd in the driveway to return at a later date. He testified that such delay in undergoing the procedures also increased the risk associated therewith.

J. On another occasion the doctor was followed as he left the clinic by a person associated with the respondents who communicated his anger to the doctor by pretending to shoot him from the adjoining vehicle. As a result of the foregoing demonstrations and activities, and after a physician similarly employed was killed by a antiabortionist at a clinic in North Florida, this doctor terminated his employment with the clinic.

K. Further the testimony of witnesses shows:

1. That license tag numbers of the clinics patients are recorded by the respondents or persons in concert with them and then are traced through state records to obtain the home address of such persons who are subsequently contacted by the respondents.

2. That on occasion repeated, nearly simultaneous, multiple telephone calls are made to the clinic, jamming its telephone lines. The jamming of the clinic's telephone system, makes it impossible for clinic staff to summon an ambulance to transfer any patient to the hospital should an emergency arise.

3. That patients and staff are sometimes followed in a stalking manner when they leave the clinic, giving such persons a feeling of great apprehension.

Conclusions

A. That the actions of the respondents and those in concert with them in the street and driveway approaches to the clinic of the plaintiffs continue to impede and obstruct both staff and patients from entering the clinic. The paved surfaces of the public right-of-way must be kept open for the free flow of vehicular traffic.

B. That the noise associated with the demonstrations impermissibly interferes with the operation of the clinic and the well-being of its patients and should be limited and restrained.

C. That the actions of the respondents and those acting in concert with them directed at the residences (including the temporary motel residence) of the clinic staff is impermissible conduct and should be limited and restrained. A person's home is his last place of refuge and his right of privacy therein should be protected. A place of business, not involved in the controversy of others, should not be subjected to demonstrations that interfere with business customers.

D. That the actions of the respondents and those acting in concert with them in respect to interfering with the telephone service of the clinic is impermissible and should be restrained.

E. That the uninvited contacts, shadowing and stalking by the respondents and those acting in concert with them of the clinic staff and patients are impermissible conduct and should be restrained.

F. That the rights of the respondents to demonstrate, speak and make known their views should be recognized and protected.

It is, therefore

ORDERED AND ADJUDGED that the respondents, Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, employees and servants, and Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs, and all persons acting in concert or participation with them, or on their behalf, with notice in any manner or by means of this order (hereinafter referred to generally as respondents) are permanently enjoined from engaging in the following:

(1) At all times on all days, from entering the premises and property of the Aware Woman Center for Choice, Inc. Clinic (hereinafter Clinic) located at the northwest corner of U.S. Highway One and Dixie Way in Melbourne, Brevard County, Florida.

(2) at all times on all days, from blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of the Clinic.

(3) At all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way or private property within thirty-six (36) feet of the property line of the Clinic. The 36 foot buffer on the south side of the Clinic is demarcated by the south edge of paved surface of Dixie Way. It is the intent of the court that the respondents may use, subject to other restrictions contained herein, the unpaved portion (the shoulder) on the south side of Dixie Way. A drawing is attached hereto showing the various areas and lines. An exception to the 36 foot buffer zone is the area immediately adjacent to the Clinic on the east, lying in the right-of-way of U.S. Highway One. This area is composed of a flat shoulder area rising up an embankment to the easterly property line of the Clinic. The respondents may enter the shoulder area of U.S. Highway One, but may not go up the embankment and must remain at least five (5) feet from the Clinic's east line. Another exception to the 36 foot buffer zone relates to the record title owners of the property to the north and west of the Clinic. The prohibition against entry into the 36 foot buffer zone does not apply to such persons and their invitees. The other prohibitions contained herein do apply, if such owners and their invitees are acting in concert with the respondents. Another exception to the 36 foot buffer zone relates to the area of the pedestrian crosswalk near the area where Dixie Way enters into U.S. Highway One. The testimony before the Court revealed that such crosswalk is not presently marked by customary white lines. It is the request of this court, in order to assist the parties in complying with this injunction, that the City of Melbourne establish a crosswalk area at the eastern end of Dixie Way in customary manner by applying painted

lines on the surface of the pavement. Until such lines are applied, the respondents may use an area of the paved surface of Dixie Way as a crosswalk, but must confine their use of such area to a strip of pavement eight (8) feet wide, running directly from the south edge of Dixie Way to the north edge thereof, the westerly line of such strip being coextensive with the western right-of-way line of U.S. Highway One. (See drawing attached.) After painted lines are applied, the respondents must not enter any portion of the paved surface of Dixie Way outside of the crosswalk within the 36 foot buffer zone. The respondents use of the crosswalk must be limited to the prompt crossing of the street. The crosswalk may not be used as an area of picketing, congregating or demonstrating. The respondents use of the crosswalk must not inhibit or impede the free flow of traffic on Dixie Way, and no stopping or hesitation in the crosswalk shall be allowed.

(4) During the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic.

(5) At all times on all days, in an area within three-hundred (300) feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the respondents. In the event of such invitation, the respondents may engage in communications consisting of conversation of a non-threatening nature and by the delivery of literature within the three-hundred (300) foot area but in no event within the 36 foot buffer zone. Should any individual decline such communication, otherwise known as "sidewalk counseling", that person shall have the absolute right to leave or walk away and the respondents shall not accompany

such pereson, encircle, surround, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with them.

(6) At all times on all days, from approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within three-hundred (300) feet of the residence of any of the petitioners' employees, staff, owners or agents, or blocking or attempting to block, barricade, or in any other manner, temporarily or otherwise, obstruct the entrances, exits or driveways of the residences of any of the petitioners' employees, staff, owners or agents. The respondents and those acting in concert with them are prohibited from inhibiting or impeding or attempting to impede, temporarily or otherwise, the free ingress or egress of persons to any street that provides the sole access to the street on which those residences are located.

(7) At all times on all days, from physically abusing, grabbing, intimidating, harassing, touching, pushing, shoving, crowding or assaulting persons entering or leaving, working at or using services at the petitioners' Clinic or trying to gain access to, or leave, any of the homes of owners, staff or patients of the Clinic (unless permitted by "invited contact" as defined on page 10 of this order).

(8) At all times on all days, from harassing, intimidating or physically abusing, assaulting or threatening any present or former doctor, health care professional, or other staff member, employee or volunteer who assists in providing services at the petitioners' Clinic.

(9) At all times on all days, from encouraging, inciting, or securing other persons to commit any of the prohibited acts listed herein.

ORDERED AND ADJUDGED that nothing herein shall restrict duly constituted law enforcement authorities from providing traffic control and regulation and measures

necessary to insure public safety and the protection of both public and private property.

ORDERED AND ADJUDGED that any City of Melbourne police officer or other person authorized to serve process may serve a copy of this order on any individual who may not have otherwise received notice of the order. Such officer may read the operative prohibitory language of this order to any individual who is without notice of this order, and such service or oral notice shall subject the person so served or noticed to the sanctions provided for herein for failure to comply herewith. If the authorities of the City of Melbourne determine that it would assist them in enforcing this order to erect in the public right-of-way notice that the use of the area specified herein as a buffer zone is subject to court order, they are authorized to do so. Such signs may contain the following language or words of similar import: "WARNING. Demonstrations and picketing in this area are limited by court order. Violators of this court order are subject to arrest. See Amended Permanent Injunction dated April 8, 1993, filed in Case No. 91-2811-CA-16-K, Circuit Court, 18th Judicial Circuit, Seminole County, FL. Copies of the Amended Permanent Injunction are posted at Brevard County Branch Courthouse, 50 S. Neiman Ave., Melbourne, FL; Sarno Complex, 1515 Sarno Road, Melbourne, FL; and Melbourne City Hall, 900 E. Strawbridge Ave., Melbourne, FL."

ORDERED AND ADJUDGED that, in order to provide for the protection of the owners, staff and patients of the Clinic and to prevent the further disruption of the operation of the Clinic, the court hereby enters the following additional orders:

a. Law enforcement officers and Southern Bell Telephone Company are authorized, upon request of the Clinic owners to place a trap on the telephone lines of the Aware Woman Center in order to identify those per-

sons engaged in a phone blockade and jamming of the Clinic's phone lines;

b. Law enforcement authorities, pursuant to the protective provisions of the court's order, are authorized to arrest those persons who appear to be in willful and intentional disobedience of this injunction. Upon such arrest the person so arrested shall be admitted to bail upon the posting of a $500 cash or surety bond, which bond will be returnable before the undersigned judge at his chambers, Room N327, Seminole County Courthouse, 301 N. Park Avenue, Sanford, FL at 8:30 a.m. on the seventh (7th) day after arrest exclusive of weekends and holidays. Any county or circuit judge in Brevard County is authorized to modify, upward or downward, the dollar amount and the return date of such bond upon good cause being shown. In the event of arrest and no bond being posted, the person arrested shall be promptly transferred to the Seminole County jail and the undersigned judge shall be immediately notified by the arresting officer and Seminole County jailer of such confinement. Such arrested persons shall be brought before the undersigned judge not later than 8:30 a.m. of the day following his confinement in the Seminole County jail.

ORDERED AND ADJUDGED that at all times on all days, respondents shall have the right to congregate, demonstrate and freely express themselves outside the Clinic buffer zone subject to the noise limitations on the days of surgical procedures set out in paragraph 4 of this order and subject also to all other provisions of this order and any other restraining orders and injunctions that may have been issued by other courts.

ORDERED AND ADJUDGED that at all times on all days, respondents will have the right of invited contact with persons protected hereby so long as it is outside of the Clinic buffer zone. "Invited contact" is defined as conduct by the person sought to be contacted which affirm-

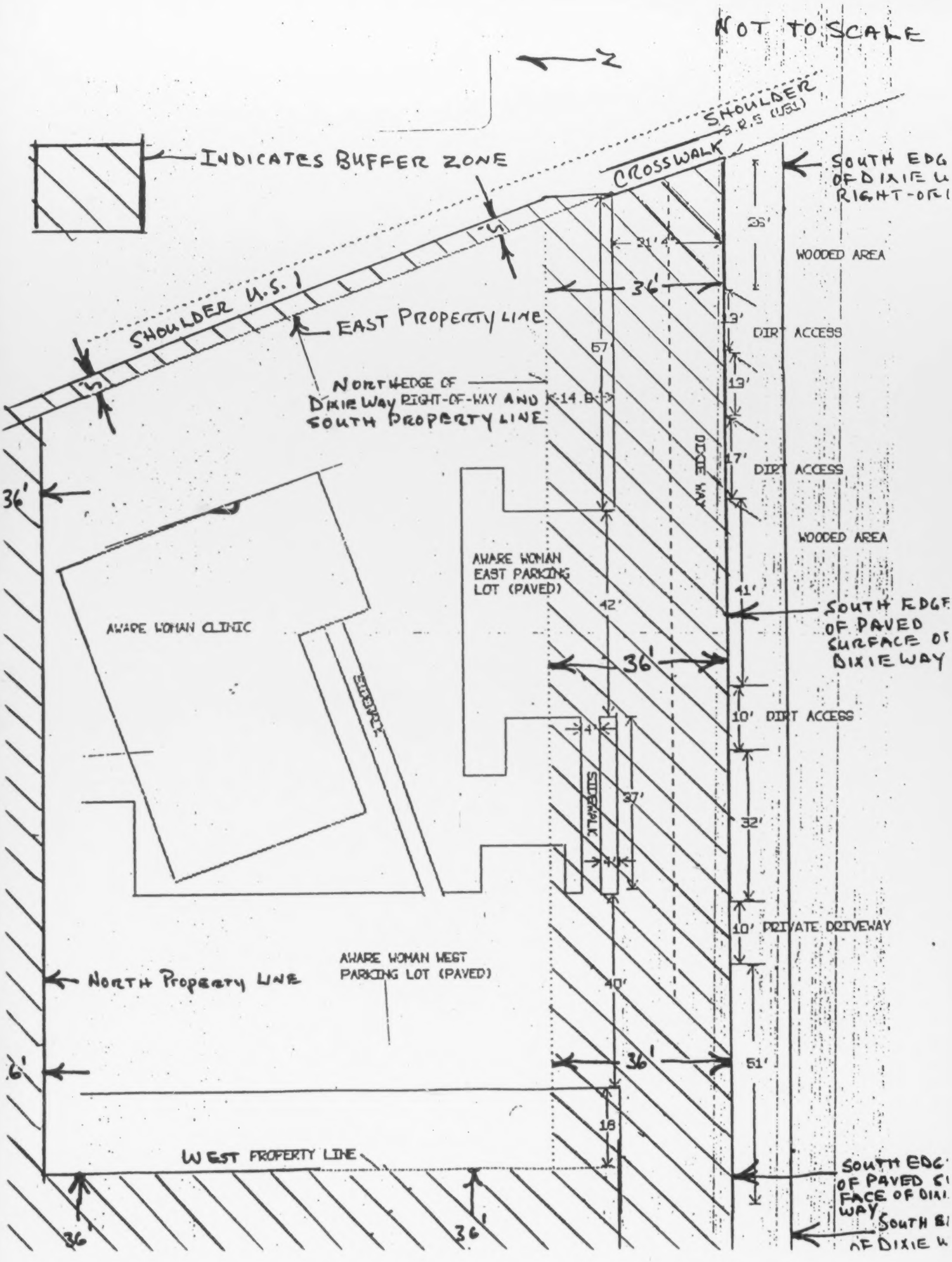
atively indicates a desire to engage in conversation or to receive literature. Such affirmative indication may include where the person sought to be contacted physically approaches the respondent, or where such person extends his or her hand to receive literature, or speaks words indicating a positive interest in what the respondent is saying. Such invited contact by a person protected hereby as it relates to a contact at such persons residence is limited to conduct transmitted by the resident to a respondent at a distance from and at a time prior to the contact and shall not include the uninvited ringing of a doorbell or knock on a door. Any invited contact may be canceled by such person by words spoken that indicate a desire to end the contact, such as "stop", "withdraw", "back off", "get away", "leave me alone" or words or actions of similar import. Where such desire to end the contact is made known to a respondent, he/she must immediately terminate the contact and leave the presence of the person protected hereby.

ORDERED AND ADJUDGED that the permanent injunction of this court issued September 30, 1992, shall remain in full force and effect as to all persons and entities and places mentioned therein except as hereby modified.

Attached hereto and made a part hereof is a drawing which shows the Clinic buffer zone referred to in this order.

DONE AND ORDERED in Sanford, Seminole County, Florida this 8th day of April, 1993.

/s/ Robert B. McGregor
ROBERT B. MCGREGOR
Circuit Judge


NOT TO SCALE
INDICATES BUFFER ZONE
SHOULDER U.S. 1
SHOULDER S.R.5 (US1)
CROSSWALK
EAST PROPERTY LINE
NORTH EDGE OF DIXIE WAY RIGHT-OF-WAY AND SOUTH PROPERTY LINE
SOUTH EDG OF DIXIE W RIGHT-OF-
WOODED AREA
DIRT ACCESS
DIRT ACCESS
WOODED AREA
DIXIE WAY
AWARE WOMAN CLINIC
AWARE WOMAN EAST PARKING LOT (PAVED)
SIDEWALK
SOUTH EDGE OF PAVED SURFACE OF DIXIE WAY
10' DIRT ACCESS
10' PRIVATE DRIVEWAY
AWARE WOMAN WEST PARKING LOT (PAVED)
NORTH PROPERTY LINE
WEST PROPERTY LINE
SOUTH EDG OF PAVED S FACE OF DIX WAY
SOUTH E OF DIXIE W
36'
31'4"
67
42'
41'
40'
51'
18
37'
32'
4'
13'
17'

APPENDIX C

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

Case No. 93-969

OPERATION RESCUE, OPERATION RESCUE AMERICA, OPERATION GOLIATH, ED MARTIN, BRUCE CADLE, JUDY MADSEN, *et al.*,
Appellant,

v.

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC.,
Appellee.

Date: June 3, 1993

BY ORDER OF THE COURT:

The Appellants seek review of an order of the Circuit Court for Seminole County, Florida, granting a permanent injunction sharply restricting demonstrations outside an abortion clinic. The Appellants allege that the injunction infringes upon the exercise of First Amendment rights to peacefully demonstrate, picket, distribute literature and express one's self on public property, sidewalks, roadways, and rights of way. The Appellees argue that the injunction protects their First Amendment rights, their rights to privacy, their rights to engage in business activity, and their clients' rights to obtain medical treatment. Appellants have and are engaging in such activities on a

statewide basis that similar injunctions have been issued throughout the state. The constitutionality of the injunction(s) require immediate resolution by the Florida Supreme Court. Accordingly, it is

ORDERED that the JOINT MOTION FOR CERTIFICATION OF CASE TO THE FLORIDA SUPREME COURT, filed April 27, 1993, is granted. Moreover, it is

ORDERED that this Court hereby certifies that the constitutionality of the injunction issued below is an issue of great public importance and one which will have a great effect on the proper administration of justice throughout the State. This Court therefore requests the Supreme Court of Florida to accept jurisdiction of this cause pursuant to Florida Rule of Appellate Procedure 9.125.

I hereby certify that the foregoing is (a true copy of) the original court order.

/s/ Frank J. Habershaw
FRANK J. HABERSHAW
Clerk

(Court Seal)

APPENDIX D

IN THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

Case No. 91-2811-CA 16 K

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., and CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,
Petitioners,

v.

OPERATION RESCUE, OPERATION RESCUE AMERICA, OPERATION GOLIATH, ED MARTIN, BRUCE CADLE, PAT MAHONEY, RANDALL TERRY, JUDY MADSEN, and SHIRLEY HOBBS,
Respondents.

TEMPORARY INJUNCTION

[Filed Oct. 25, 1991]

Upon the Affidavits of Patricia Baird Windle, owner of the Aware Woman Center for Choice, Inc., Patte Martin, owner of the Birth Control Center, Inc, and Tammy Sobieski-Joy, employee of the Women's Health Care Center, Inc., and Birth Control Center, Inc., the Verified Motion for a Temporary Restraining Order, the Verified Complaint and the exhibits attached thereto in and in consideration of the public's safety and welfare, and being otherwise advised in the premises, the Court finds that there is a genuine and immediate threat to the businesses and reputations of the Petitioners, that irreparable harm will be suffered by Petitioners if this temporary restraining order is not entered immediately, that

Petitioners have no adequate remedy at law, that there is a genuine and immediate threat to Petitioners and their employees and patients and all women in the central Florida area seeking to exercise constitutionally protected rights, and that there is a genuine threat to the health, safety and welfare of the citizens of the State of Florida and it is hereby

ORDERED AND ADJUDGED that:

1. All Respondents, the officers, directors, agents, representatives of Respondents, and all other persons, known and unknown, acting on behalf of any Respondents, or in concert with them, in any manner of by any means, are hereby enjoined and restrained from:

a) trespassing on, sitting on, blocking, or obstructing ingress into or egress from any facility in which abortions are performed or family planing services are provided in the County of Brevard and Seminole, and surrounding counties, State of Florida, of any person seeking access to or leaving those facilities;

b) physically abusing persons entering, leaving, working at or using any services at any facility in which abortions are performed or family planning services are provided, in the County of Brevard and Seminole, and surrounding counties, State of Florida;

c) attempting or directing others to take any of the actions described in paragraphs a) and b);

2. Nothing in this Court's Order should be construed to limit Respondents' exercise of their legitimate First Amendment rights, such as, but not limited to, carrying signs, singing, and praying, in a manner which does not violate a), b), and c) above;

3. The Respondent organizations and their officers, the Respondent individuals, and those working in concert with any Respondent, shall instruct all members of the Respondent organizations not to engage in or participate

in any activities prohibited in Paragraphs a), b), and c) above;

4. Penalties will be imposed by this Court for violations of this Temporary Injunction by any of the Respondents, any officer, director, agent, representative of the Respondents, and any other persons known or unknown, acting on behalf of the Respondents, or in concert with them, in any manner or by any means;

5. At the site of violation of the Temporary Injunction, this Order may be served by law enforcement officers on any individual who is without notice of the Temporary Injunction, or the contents of this Order may be read by law enforcement officers to any individual who is without notice of the Temporary Injunction, and such service or oral notice shall subject the served person to the provisions and sanctions of this Order. If after service or oral notice the individual refuses to comply, the individual will be subject to the sanctions of this Court for failure to comply, and it is further

ORDERED AND ADJUDGED that:

This Temporary Injunction is effective as of October 25, 1991. A bond in the amount of $1000.00 shall be posted by the Petitioners by 5:00 p.m. on October 25, 1991, and it is further

ORDERED AND ADJUDGED that:

The provisions of this order shall become effective on the named parties upon personal service of this order as provided by law.

DONE AND ORDERED at Sanford, Florida this 25th day of October, 1991, at 4:20 P.M.

/s/ Robert B. McGregor
Circuit Judge

APPENDIX E

IN THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

Case No. 91-2811-CA

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., and CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,
Petitioners,

v.

OPERATION RESCUE, OPERATION RESCUE AMERICA, OPERATION GOLIATH, ED MARTIN, BRUCE CADLE, PAT MAHONEY, RANDALL TERRY, JUDY MADSEN, and SHIRLEY HOBBS,
Respondents.

PERMANENT INJUNCTION

This cause came before the court upon the petition for permanent injunction and, based upon the arguments of counsel, the affidavits and the stipulation of the parties, the court finds:

Findings of Fact

1. Petitioners brought this action seeking a permanent injunction to protect the health, safety and rights of women in Brevard and Seminole County, Florida and surrounding counties seeking access to abortion, gynecological and other family planning services.

2. Respondents are individuals and organizations, acting in concert, who have planned a nationwide campaign, which they call "OPERATION RESCUE" (hereinafter, "OPERATION"), directed towards closing down abortion

clinics and providers throughout the country. Respondents' own literature states that their intention is to "Physically close down abortion mills" by encircling them with thousands of protesters and blocking access to the facilities. Operation Goliath is dedicated to similar principles.

3. Petitioners are the owners of certain real property located in Brevard and Seminole County, Florida and other parts of Central Florida upon which businesses are run by petitioners which offer abortions along with birth control counselling to women.

4. Ed Martin, Pat Mahoney, Randall Terry, Judy Madsen and Shirley Hobbs are members of Operation Rescue and Operation Rescue America.

5. Ed Martin and Pat Mahoney have stated an intent to prevent persons from obtaining abortions in the Brevard and Seminole County area by blocking access to clinics

6. Respondents have passed out flyers in the Central Florida area stating an intent to close down abortion clinics in this area.

7. Respondent, Pat Mahoney, was a leader in the Wichita, Kansas protests. Respondents, Ed Martin and Pat Mahoney, have made statements that there will be or may be a blocking of the entrance to an abortion clinic in the Central Florida area. Pat Mahoney and Ed Martin have stated to members of the press that they intend to shut down a clinic, and have issued a press release which states that "the spirit of Wichita comes to Florida". The press release also contained information that the Reverend Ed Martin of Ocala announces an "Operation Rescue" for Central Florida.

8. Literature obtained from Rescue America states that their members should ignore the law of the State and the police officers who remove them from their blockading positions.

9. Respondents, OPERATION GOLIATH and its director, Bruce Cadle, disseminate written communication

to various individuals throughout the country, some of whom reside in Seminole and Brevard County, which contains statements about closing down abortion clinics similar to those in the OPERATION RESCUE literature.

10. Petitioners and petitioners' patients and employees have no adequate remedy at law and will suffer irreparable harm if respondents are not enjoined from blocking or otherwise interfering with access to petitioners' clinics.

Conclusions of Law

1. An injunction is the appropriate remedy to prevent interference with petitioners' prospective business relationships with potential clients seeking access to abortion, gynecological, and other family planning services offered by petitioners. *See Drake v. Henson,* 448 So.2d 1205 (Fla. 3rd DCA 1984); *DeRitis v. Ahz Corporation,* 444 So.2d 93 (Fla. 4th DCA 1984). Respondents have engaged and threatened to engage in continuing wrongs to petitioners' property interests and their business relationships and prevention of said interference is a proper basis for injunctive relief. *See Detolo v. Schouten,* 426 So.2d 1013 (Fla. 2nd DCA 1983); *Unistar Corporation v. Child,* 415 So.2d 733 (Fla. 3rd DCA 1982). Since respondents' interference and intended interference is clearly harmful conduct that results in irreparable harm, an injunction is appropriate. *See Sentry Insurance v. Dunn,* 411 So.2d 336 (Fla. 5th DCA 1982). Respondents activities have improperly resulted in an interruption of business activities and continuing damage to petitioners' business reputation.

2. The right of choice is strongly protected in Florida based upon the explicit language of Article I, Section 23 of the Florida Constitution. *See In re T.W.,* 551 So.2d 1186 (Fla. 1989). In addition to interfering with petitioners' prospective business relationships, respondents have sought to interfere with petitioners' patients right of choice which is protected under the Florida Constitution.

Additionally, respondents activities have interfered with petitioners' employees right to work which is guaranteed under Article I, Section of the Florida Constitution.

3. Although respondents potential actions may be criminal in nature, they also constitute a recognized ground of equitable relief for which injunction is appropriate. *See Drake v. Henson, supra; DeRitis v. Ahz Corporation, supra.* While injunctive relief will generally not lie to restrain criminal activity unaccompanied by some recognized ground of equitable relief, the intervention of equity is warranted to protect civil or property interests where criminal prosecution is inadequate to effect this purpose. *See Syfo Water Company v. Chakoff,* 182 So.2d 17 (Fla. 3rd DCA 1965); *Davis v. Florida East Coast Railroad,* 166 So.2d 774 (Fla. 2nd DCA 1964). The criminal trespass statutes do not address the injuries which will occur to petitioners if respondents are not restrained from engaging in the activities which are sought to be enjoined.

Based upon the foregoing it is

ORDERED:

A. Respondents, OPERATION RESCUE, OPERATION, RESCUE AMERICA, OPERATION GOLIATH, Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, July Madsen, and Shirley Hobbs, are hereby enjoined from:

1) trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from any facility at which abortions are performed in Brevard and Seminole County, Florida;

2) physically abusing persons entering, leaving, working or using any services of any facility at which abortions are performed in Brevard and Seminole County, Florida; and,

3. attempting or directing others to take any of the actions described in Paragraphs 1 and 2 above.

B. Nothing in this Court's Order should be construed to limit Respondents' exercise of their legitimate First Amendment rights, such as, but not limited to, carrying signs, singing, and praying, in a manner which does not violate 1), 2), and 3) above;

C. This Court retains jurisdiction for determination of any costs to be imposed upon Respondents.

DONE AND ORDERED in Chambers at Sanford, Seminole County, Florida, this 30 day of September, A. D. 1992.

/s/ Wallace H. Hall
WALLACE H. HALL
Circuit Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 93-2407

MYRNA CHEFFER,
Plaintiff-Appellant,
v.

ROBERT McGREGOR,
Circuit Judge for the 18th Judicial Circuit,
NORMAN WOLIGR,
State Attorney for Seminole and Brevard Counties,
CLAUDE MILLER, Sheriff for Brevard County,
KEITH I. CHANDLER, Melbourne, Chief of Police,
Defendants-Appellees.

Oct. 20, 1993

Before TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and PAINE,* Senior District Judge.

TJOFLAT, Chief Judge:

Myrna Cheffer appeals from the district court's denial of her motion for a preliminary injunction preventing the enforcement of a state court injunction that regulates anti-abortion speech at an abortion clinic. Because the district court mistook the legal significance of the state court injunction, and therefore erred in its application of the

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* Honorable James C. Paine, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

law to the merits of Cheffer's motion, we vacate and remand.

I.

Perhaps few Americans are content with the current legal status of abortion in America. Many see a woman's ability to choose abortion as a part of her fundamental constitutional right of self-determination that is ill-protected by the wavering jurisprudence of the Supreme Court. Many others see the 1.4 million abortions each year as an American Holocaust permitted by the moral vacillation of the government. This case arises out of the clash of these opposing beliefs, and governmental attempts to restrict their free expression.

The Aware Woman Center for Choice is a corporation that operates an abortion clinic in a residential neighborhood in Melbourne, Florida. Operation Rescue is a major antiabortion organization known for picketing abortion clinics such as the Aware Woman Center. The Honorable Robert McGregor is a Florida Circuit Judge. Judge McGregor's docket includes the case *Aware Woman Center for Choice v. Operation Rescue,* No. 91-2811-CA-16-K, which concerns the conflict that arose when Operation Rescue and others began an aggressive campaign of picketing against the abortion clinic.

On April 8, 1993, Judge McGregor issued an Amended Permanent Injunction [1] in which he enjoined certain activities of Operation Rescue and others in a court-drawn "buffer zone" surrounding the abortion clinic. The injunction, which was (to say the least) legislative in tone, was directed at

> Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, em-

[1] Circuit Judge Wallace H. Hall had entered a prior injunction on September 30, 1992. In the Amended Permanent Injunction, Judge McGregor found that the prior injunction had not prevented "interference with ingress to . . . the Aware Woman Clinic."

ployees and servants, and Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs, and all persons acting in concert or participation with them, or on their behalf, with notice in any manner or by any means of this order.

This group (collectively "Operation Rescue" or "the state court defendants") was enjoined

> (1) At all times on all days, from entering the premises and property of the Aware Woman Center for Choice, Inc. Clinic (hereinafter Clinic) located at the northwest corner of U.S. Highway One and Dixie Way in Melbourne, Brevard County, Florida.
>
> (2) At all times on all days, from blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of the Clinic.
>
> (3) At all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way or private property within thirty-six (36) feet of the property line of the Clinic. . . . It is the intent of the court that the [defendants] may use, subject to other restrictions contained herein, the unpaved portion (the shoulder) on the south side of Dixie Way. . . .
>
> (4) During the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic.
>
> (5) At all times on all days, in an area within three-hundred (300) feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the [de-

> fendants]. In the event of such invitation, the [defendants] may engage in communications consisting of conversation of a nonthreatening nature and by the delivery of literature within the three-hundred (300) foot area but in no event within the 36 foot buffer zone. Should any individual decline such communication, otherwise known as "sidewalk counseling", that person shall have the absolute right to leave or walk away and the [defendants] shall not accompany such person, encircle, surround, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with them.
>
> (6) At all time on all days, from approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within three-hundred (300) feet of the residence of any of the petitioners' employees, staff, owners or agents, or blocking or attempting to block, barricade, or in any other manner, temporarily or otherwise, obstruct the entrances, exits or driveways of the residences of any of the petitioners' employees, staff, owners or agents.

A map attached to the injunction indicated a "buffer zone" to be established around the boundaries of the clinic property. The buffer zone included a public sidewalk in front of the clinic as well as a public street and adjacent right-of-way.

On its face, the injunction appears to "criminalize" various acts of peaceful protest, including the mere penetration of the buffer zone by anyone acting "in concert" with those named in the injunction. It purports to provide the following enforcement mechanism:

> Law enforcement authorities, pursuant to the protective provisions of the court's order, are authorized to arrest those persons who appear to be in willful and intentional disobedience of this injunction. Upon

> such arrest the person so arrested shall be admitted to bail upon the posting of a $500 cash or surety bond. . . . In the event of arrest and no bond being posted, the person arrested shall be promptly transferred to the Seminole County jail. . . . Such arrested persons shall be brought before the undersigned judge not later than 8:30 am of the day following his confinement in the Seminole County jail.[2]

The local police understood the injunction to require them to arrest "pro-life" individuals who violated the buffer zone. On April 11, 1993, approximately 50 apparently "pro-life" individuals were arrested for entering the buffer zone. Myrna Cheffer was not among them. Nevertheless, she filed this suit in federal district court seeking to enjoin enforcement of the state court injunction.[3]

Cheffer claimed that the injunction acted as a prior restraint on her free speech rights, and that the threat of arrest chilled her ability to exercise these rights. She sought a temporary restraining order as well as both preliminary and permanent injunctions to block the state court injunction. The district court denied the motions for a temporary restraining order and a preliminary injunction, finding that the balance of equities did not weigh in Cheffer's favor. The court deferred ruling on the motion for a permanent injunction. Cheffer now appeals.

We review a denial of an application for a preliminary injunction for abuse of discretion, adopting the district court's findings of fact unless clearly erroneous, but re-

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[2] It is obvious to us that Judge McGregor did not intend the Amended Permanent Injunction to be enforced through the civil contempt process. *See Blalock v. United States*, 844 F.2d 1546, 1558-60 (11th Cir. 1988) (contrasting civil and criminal contempt). The injunction clearly attempts to circumvent a civil contempt process that the judge considered too cumbersome.

[3] An appeal of the injunction is currently before the Florida Supreme Court.

viewing jurisdictional issue de novo. *Lucero v. Operation Rescue of Birmingham*, 954 F.2d 624, 627 (11th Cir. 1992). We consider the questions of standing and abstention in part II, then turn, in part III, to the merits of the case.

II.

An injunction is an extraordinary remedy that operates only on the parties before the court. Legislation operates more broadly, extending to all actors within the legislature's territorial jurisdiction. Nevertheless, when Judge McGregor issued the Amended Permanent Injunction in the state case, he, in effect, created a criminal statute prohibiting "pro-life" free speech activity in a certain geographical location. Had he merely enjoined the defendants in the state suit from certain actions, Cheffer would have suffered no injury—she would be free to engage in peaceful speech activity on the sidewalk in front of the clinic. But by extending the injunction to nonparties and by attaching criminal penalties to activities otherwise protected by the Constitution, Judge McGregor crafted a law that seems to apply to Cheffer, who is neither a party nor an agent of any party.[4] It is this unusual characteristic of the injunction that seems to have misled the district court. We refuse to prefer form over substance; the injunction has all the attributes of a criminal statute and we will treat it accordingly.

A.

Although she was neither a party to the state suit nor one of those arrested for violating the buffer zone, Cheffer does not lack standing to bring this case. A plaintiff in federal court must satisfy the "case or controversy" re-

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[4] Although we may be permitted our doubts as to the legitimacy of the injunction under Florida law (because, for one thing, it serves as a criminal sanction under the cloak of a civil injunction and thus may constitute an abuse of process), we assume, for the sake of argument, that Judge McGregor did not overstep his authority in crafting the order.

quirement of Article III of the Constitution by showing that she has suffered an injury-in-fact that would be corrected by favorable decision in the lawsuit. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471-72, 102 S.Ct. 752, 758 (1982).

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."

Id. (citations omitted) (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1608 (1979), and *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1924, 1925 (1976)). Thus, a plaintiff who has not been prosecuted under a criminal statute does not normally have standing to challenge the statute's constitutionality. *See Boyle v. Landry*, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971) (finding that plaintiffs who had neither been prosecuted nor specifically threatened with prosecution did not have standing).

Standing requirements to challenge speech restrictions, however, are less strict. "[I]n the First Amendment context, [l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Virginia v. American Booksellers Assoc., Inc.*, 484 U.S. 383, 392-93, 108 S.Ct. 636, 643 (1988) (internal quotations omitted); *see also Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956-57, 104 S.Ct. 2839, 2846-47 (1984); *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908,

2916 (1973).[5] We conclude that Cheffer has standing to challenge the restrictions placed on her free speech by the Amended Permanent Injunction.

B.

Neither does the abstention doctrine block Cheffer's suit. The Supreme Court has directed that federal courts should not intervene in ongoing state proceedings "when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *See Younger v. Harris,* 401 U.S. 37, 43-44, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971).[6]

As we have noted before,

> the initial inquiry in determining whether a federal court should abstain when asked to enjoin an ongoing state civil proceeding is whether an important governmental interest of the state is implicated by that civil action so that such an injunction would be an offense to the State's interest . . . likely to be every

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[5] Under this rule of standing, it is unimportant that Cheffer has alleged that she intends to exercise her own rights to free speech.

[6] *Younger* itself expressed a fundamental "public policy against federal interference with state criminal prosecutions," 401 U.S. at 43, 91 S.Ct. at 750, but later cases have extended this deference to some state civil actions. In general, "[t]he policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved." *Middlesex County Ethics Comm. v. Garden State Bar Assoc.*, 457 U.S. 423, 431, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982); *see Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 2, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987). In particular, the Supreme Court extended the doctrine to cover the civil contempt process in *Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d. 376 (1977). The issue to be resolved is whether "the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government." *Pennzoil*, 481 U.S. at 11, 107 S.Ct. at 1526.

> bit as great as it would be were this a criminal proceeding.

First Alabama Bank v. Parsons Steel, Inc., 825 F.2d 1475, 1483 (11th Cir. 1987) (internal quotations omitted), *cert. denied*, 484 U.S. 1060, 108 S.Ct. 1015 (1988). It appears that important state interests, including the enforceability of state court injunctions, are involved in the present case.

Younger abstention is only appropriate, however, when the federal constitutional claims at issue can be raised by the federal plaintiff in an ongoing state court proceeding. *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986) (holding that *Younger* applies "so long as in the course of [the state] proceedings the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim"); *see also Juidice*, 430 U.S. at 337, 97 S.Ct. at 1218. In the instant case, Cheffer has no remedy in state court except to subject herself to a criminal contempt citation (which she probably could not resist on the ground that the underlying injunction is unconstitutional, *see In Re Novak*, 932 F.2d 1397, 1401-02 (11th Cir. 1991)). The *Younger* abstention doctrine therefore is inapplicable[7] and the district court has jurisdiction to hear Cheffer's claim.[8]

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[7] The defendants do not claim that the abstention doctrines require Cheffer to submit to arrest in order to be able to challenge the restriction in state court.

[8] Cheffer argues that the issuance of a preliminary injunction in the free speech context turns solely on whether the challenged action is unconstitutional. In other words, she suggests that "Once a violation of the First Amendment is established, preliminary injunctive relief is mandated." She relies, for this proposition, on *Gold Coast Publications, Inc. v. Corrigan*, 798 F. Supp. 1558 (S.D. Fla. 1992). While we agree that it is unlikely that an unconstitutional restriction would fail to warrant an injunction, we prefer that the district court follow the traditional analysis.

III.

It is against this backdrop, then, that the district court must consider the four prerequisites to preliminary injunctive relief. Cheffer had "the burden of proving: (1) a substantial likelihood of success on the merits; (2) substantial threat of irreparable injury; (3) [her] own injury outweighs the injury to [the clinic]; and (4) the injunction would not disserve the public interest." *Tally-Ho, Inc. v. Coast Community College Dist.*, 889 F.2d 1018, 1022 (11th Cir. 1990); *Lucero*, 954 F.2d at 627. The district court denied the motion for a preliminary injunction because it determined that Cheffer had not demonstrated that the balance of equities weighed in her favor. We conclude that the district court's misunderstanding of the legal significance of the injunction improperly colored its analysis. We must, therefore, vacate the order and remand the matter to the district court for further consideration of the plaintiff's motion for a preliminary injunction.

A.

The district court must first consider whether Cheffer demonstrated a substantial likelihood of success on the merits. When reduced to its essentials, Judge McGregor's Amended Permanent Injunction, by operating on persons not before the court, serves as a statute of local effect regulating picketing by antiabortion speakers. As a viewpoint-based restriction operating in a traditional public forum (the public streets and sidewalks around the clinic), it is subject to a most stringent review:

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly,

> communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 963, 83 L.Ed. 1423 (1939). In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Carey v. Brown*, 447 U.S. 455, 461, 100 S.Ct. 2286, 2290, 65 L.Ed.2d 263 (1980).

Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45, 103 S.Ct. 948, 954-55 (1983). That the clinic is in a residential neighborhood does not remove the characterization of the adjoining streets and sidewalks as traditional public fora. *Frisby v. Schultz*, 487 U.S. 474, 479, 108 S.Ct. 2495, 2500 (1988) ("[O]ur decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a 'cliche,' but recognition that '[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public.'" (citations omitted)).[9]

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[9] In any case, the forum issue is not dispositive since the restriction is not viewpoint neutral. Even a nonpublic forum can only be regulated in a neutral fashion:

> Control over access to a nonpublic forum can be used on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 105 S.Ct. 3439, 351, 87 L.Ed.2d 567 (1985) (citations

That the speech restrictions at issue here are viewpoint-based cannot seriously be doubted.[10] The order enjoins

> Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, employees and servants, and Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs, and all persons acting in concert or participation with them or on their behalf. . . .

Such a restriction is no more viewpoint-neutral than one restricting the speech of "the Republican Party, the state Republican Party, George Bush, Bob Dole, Jack Kemp and all persons acting in concert or participation with them or on their behalf." The practical effect of this section of the injunction was to assure that while "pro-life" speakers would be arrested, "pro-choice" demonstrators would not.[11]

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omitted). A restriction on "pro-life" speech would not even be permissible in the context of a nonpublic forum.

[10] We note that the Ninth Circuit reached a different result on similar facts in *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988). There an injunction against "demonstrating or distributing literature . . .; shouting, screaming, chanting, or yelling" by antiabortion organizations and those acting in concert was deemed to be content-neutral and thus a reasonable time, place, or manner restriction on speech. *Id.* at 684, 686. The court argued

> The preliminary injunction is not a content-based restriction of expression. It refers not at all to the specific viewpoints that the advocates press, nor even to the general issues raised at their demonstrations. Rather, if focuses exclusively on the location and manner of expression. It protects the clinic from loudness and physical intimidation, not from content of speech. Therefore, we apply to the preliminary injunction the rules regarding the constitutionality of "time, place, and manner" regulations of speech.

Id. at 686. We do not find this reasoning at all persuasive.

[11] This is apparently precisely what occurred. Several of those arrested testified (at a preliminary hearing convened by Judge

A viewpoint-specific restriction in a traditional public forum is unconstitutional unless (1) it is necessary to serve a compelling state interest and (2) it is narrowly drawn to achieve that end. *See Carey*, 447 U.S. at 461-62, 100 S.Ct. at 2290. The state court injunction does not seem to be either.

B.

The second inquiry concerns the threat of irreparable injury faced by the plaintiff. The Supreme Court has noted that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690 (1976); *see New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140 (1971).

C.

The third inquiry is into the relative injury to Cheffer and to the clinic. The district court concluded that Cheffer did not carry her burden as to this point.

It is difficult indeed to weigh the relative value of different constitutional rights. Our sister circuit described a similar abortion protest case as a "clash . . . between constitutional rights defined by the Supreme Court: an old one tracing its roots to the speech clause of the First Amendment and before, and a new one stemming from

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McGregor as provided for in the injunction) that they were designated for arrest by clinic workers and police officers because they were perceived to be "pro-life". Judge McGregor accepted this interpretation of the intent of the injunction and explained (to the arrestees):

> [T]he injunction did not pertain to those on the other side of the issue, because the word in concert with means in concert with those who had taken a certain position in respect to the clinic, adverse to the clinic. If you are saying that is selective basis that the pro-choice were not arrested when pro-life was arrested, that's the basis of that selection.

Roe v. Wade." *Mississippi Women's Medical Clinic v. McMillan,* 866 F.2d 788, 791 (5th Cir. 1989). We note, however, that in the instant case there is no indication in the record that women were actually prevented from obtaining abortions at the Aware Women Center for Choice. The clash here is between an actual prohibition of speech and a potential hinderance to the free exercise of abortion rights.[12] Should the district court issue an injunction barring the state court from enforcing its injunction as a criminal statute, it would promote only speech and expressive conduct, not assault, trespass, or destruction of property.

D.

Finally, the district court must consider whether the issuance of the federal injunction would disserve the public interest. The importance of "the principle that debate on public issues should be uninhibited, robust, and wide-open" suggests that the issuance of the injunction would be no disservice at all.

It is tempting, of course, to entertain the argument that the speech in this case is disruptive, discourteous, and offensive, but that is irrelevant. The Supreme Court recently reminded us

> As we have often had occasion to repeat, " '[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional

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[12] In the Amended Permanent Injunction the state circuit court recites a variety of inconveniences (e.g., "As vehicular traffic approached the [clinic] area it would, in response to the congestion, slow down. If the destination of such traffic was either of the two parking lots of the [clinic], such traffic slowed even more, *sometimes having to momentarily hesitate or stop until persons in the driveway moved out of the way.*"). (Emphasis added). Those apparently isolated incidents which were more intrusive (e.g. "stalking") are, for the most part, already tortious or criminal.

protection.'" *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 55, 108 S.Ct. 876, 882, 99 L.Ed.2d 41 (1988) (quoting *FCC v. Pacifica Foundation,* 438 U.S. 726, 745, 98 S.Ct. 3026, 3038, 57 L.Ed.2d 1073 (1978)). "'If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'" *United States v. Eichman,* 496 U.S. ——, ——, 110 S.Ct. 2404, 2410, 110 L.Ed.2d 287 (1990) (quoting *Texas v. Johnson,* 491 U.S. 397, 414, 109 S.Ct. 2533, 2544, 105 L.Ed.2d 342 (1989)).

Simon & Schuster v. New York Crime Victims Bd., 112 S.Ct. 501, 509 (1991). We protect much that offends in the name of free speech—we cannot refuse such protection to those who find abortion morally reprehensible.

IV.

The district court treated the state court injunction as an ordinary injunction when it had the effect of a criminal statute. Consequently, the order of the district court was founded on a mistake of law. We vacate the order, and remand for further consideration of the issuance of a preliminary injunction in light of this opinion.

IT IS SO ORDERED.

PAINE, Senior District Judge, dissenting:

I would remand this case with instructions to the district court to enjoin enforcement of the state court's Amended Permanent Injunction against Myrna Cheffer ("Cheffer"), a person shown not to be acting in concert with the respondents in the state case.

The central facts of this matter concern the harassment of the function or undertakings of the Aware Woman Center for Choice, an abortion clinic. Prior restraint of the constitutional right of free speech by Cheffer is a concomitant issue adequately treated by the district court order. The strong remand suggested by the majority, bottomed on free speech, provides an imprecise emphasis.

The Amended Permanent Injunction details a factual background omitted by the majority opinion. On September 30, 1992, Judge Wallace H. Hall had entered an injunction against Respondents, three pro-life organizations and six individual pro-life activist, prohibiting interference with ingress to the Aware Woman Center. On April 8, 1993, following a three-day evidentiary hearing on Petitioners' motion to modify the injunction, Judge Robert McGregor found, in summary, that:

A. Despite the previous injunction, persons continued to interfere with ingress to the clinic, by standing on the paved portions of Dixie Highway, standing, kneeling, and sitting on the unpaved portions of the road, approaching moving vehicles on the paved surface, and marching in a picket line that traversed the entrance driveways to the facility's two parking lots. Cars approaching the area were forced to slow down, particularly those wishing to enter the parking lots.

B. Crowds of up to 400 people would gather at the clinic one to three times per week. The crowds included, not only the named Respondents, but other pro-life demonstrators, pro-choice demonstrators, up to 50 law en-

forcement officers engaging in crowd and traffic control, and media representatives.

C. The gatherings would feature singing, chanting, whistling, music, and bullhorns. Pro-life and pro-choice groups would shout and yell at each other, often competing to make the most noise.

D. The police were sometimes forced to erect barricades to separate the rival groups and permit traffic flow. The pro-life demonstrators would generally remain in the public right of way, while their pro-choice counterparts occupied private property on the clinic's lawn and parking lot.

E. Vehicles slowing to enter the clinic's driveway would be approached by persons designated by Respondents as "sidewalk counselors," who attempted to hand anti-abortion literature to the occupants and discourage their use of the clinic.

F. The clinic has fences on its west and north sides. Persons would occasionally climb a ladder above the fences to shout at staff and patients entering the facility. On one occasion a demonstrator yelled to a clinic staffer, "I pray that God strikes you dead now!"

G. Since the entry of the previous injunction, Respondent Bruce Cadle and others in concert with him have approached the private residences or temporary lodging places of clinic employees, to confront the occupants (including minor children), picket, shout at passers-by, contact neighbors, and hand out literature identifying the employee as a "baby killer."

H. On one occasion, Cadle and others demonstrated outside a motel where a staff physician was staying. While Cadle remained outside, his cohorts entered the motel lobby, yelling "child murderer" and "baby killer." The disturbance delayed the doctor's departure for the clinic by one-half hour.

I. The same physician was once delayed outside the clinic while Cadle and others stood in front of his car, screaming "baby killer we don't want you here in Melbourne." This physician further witnessed demonstrators running alongside, and in front of, patients' vehicles, pushing pamphlets in car windows to persons who had not indicated any interest therein. Patients experiencing this confrontation manifested a higher level of anxiety and hypertension, requiring a heavier sedation, and its associated medical risks to undergo the surgical procedure. The noise of singing, chanting, and shouting also caused stress to patients during the surgery and recuperation. In addition, the doctor observed prospective patients turn away from the crowd in the clinic's driveway to return at a later date, which only increases the risk associated with the procedure.

J. While driving home one evening, the same physician was followed by a person associated with Respondents, who pretended to shoot him from an adjoining vehicle. As a result of these activities, and the shooting of a physician in North Florida by an anti-abortionist, the physician terminated his employment with the clinic.

K. Respondents or persons in concert with them recorded the license plate numbers of clinic patients, obtained their home addresses, and contacted the patients. On occasion, multiple telephone calls have been placed to the clinic, jamming their telephone lines and making it impossible to summon an ambulance for a medical emergency. Patients and staff are sometimes followed in a stalking manner when they leave the clinic, causing them great apprehension.

Judge McGregor thereupon entered the Amended Permanent Injunction against Respondents, Operation Rescue, Operation Rescue America, Operation Goliath, Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, Shirley Hobbs, and all persons acting on behalf

of or "in concert with" them,[1] the prohibitions of which are summarized by the majority.

This federal proceeding involves the constitutional challenge of Cheffer, a pro-life activist who claims that she is not working in concert with the named Respondents, wishes to engage in peaceful "sidewalk counseling" near the clinic, but fears arrest because (i) 50 similarly independent pro-life demonstrators were arrested on April 10, 1993, and (ii) Judge McGregor commented, during their initial appearances, that he considered any pro-life demonstrator to be acting in concert with the named Respondents for purposes of the Amended Permanent Injunction. On April 13, 1993, Cheffer filed a verified Complaint for Declaratory Judgment and Preliminary and Permanent Injunctive Relief, Motion for Temporary Restraining Order, Motion for Preliminary Injunction and Permanent Injunction, with supporting affidavits and memoranda of law, seeking to prevent enforcement of the Amended Permanent Injunction against her. The next day, the district court denied the requests for a temporary restraining order and preliminary injunction "[b]ased on a review of the case file and the relevant law," without conducting an evidentiary hearing or permitting further briefing.

The majority concludes that "the district court mistook the legal significance of the state court injunction. . . ." Based upon a provision authorizing the arrest of willful violators, and the subsequent arrest of persons who claim

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[1] Florida Rule of Civil Procedure 1.610(c), like Federal Rule of Civil Procedure 65(d), provides that "[e]very injunction . . . shall be binding on the parties to the action, their officers, agents, servants, employees, and attorneys and on those persons in active concert or participation with them who receive actual notice of the injunction." These procedural rules are derived from the common law doctrine that "defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945).

no association to the state court litigation, the majority, in the name of "substance over form," but without citation of legal precedent, elects to treat the Amended Permanent Injunction as a criminal statute and remands the case so that the district court may do the same.[2] This Court has, however, previously affirmed an arrest, detention, and conviction pursuant to a civil injunction that expressly provided: "Anyone having notice of this order who violates any of the terms thereof shall be subject to arrest, prosecution and punishment by imprisonment or fine, or both, for criminal contempt. . . ." *United States v. Hall*, 472 F.2d 261, 263-64 (5th Cir. 1972) (emphasis added).[3] Furthermore, this Court has analyzed an injunction purportedly directed at "all persons who are residents of Colquitt County, Georgia" as "impermissibly broad," narrowed its application to the parties, then affirmed the injunction as modified. *Harrington v. Colquitt County Bd. of Educ.*, 449 F.2d 161 (5th Cir. 1971). The majority's unprecedented decision to assume an impossibility—that a state court judge has passed legislation—skews its analysis.

This improper analytical framework affects the threshold question whether Cheffer, as a supposed stranger to the litigation, has standing to attack the Amended Permanent Injunction. Because the majority has deemed the order an act of legislation, it invokes the substantial overbreadth doctrine, which permits First Amendment litigants "to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from

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[2] In so doing, the majority manages to read Judge McGregor's mind, determining that he "considered [the civil contempt process] too cumbersome."

[3] The Eleventh Circuit, in the en banc decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

constitutionally protected speech or expression." *Virginia v. American Booksellers Assoc., Inc.*, 484 U.S. 383, 392-93 (1988); *see also Massachusetts v. Oakes*,—U.S. 109 S.Ct. 2633, 2637-38 (1989). Under this analysis, Cheffer's own intention to speak is considered by the majority to be "unimportant."

The substantial overbreadth doctrine, however, has no application to injunctions, which bind only the parties and do not chill the conduct of others. *United States v. Local 560 (I.B.T.)*, 974 F.2d 315, 344 n.16 (3d Cir. 1992). A non-party ordinarily lacks standing to assert the free speech constitutional rights of parties subject to an injunction. *Radio & Television News Ass'n v. United States Dist. Court*, 781 F.2d 1443, 1448 (9th Cir. 1986); *see generally Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80-81 (1978) (discussing third-party standing). Cheffer's standing hinges entirely on her intention to speak and the "credible threat" of prosecution posed by Judge McGregor's statements regarding his interpretation of the injunction. *Kolender v. Lawson*, 461 U.S. 352, 355 n.3 (1983); *see also Steffel v. Thompson*, 415 U.S. 452, 459-60 (1974). Cheffer has proven a sufficient connection to the state court injunction to confer standing.

A review of *Younger v. Harris*, 401 U.S. 37, 41-43, 46 (1971), and its progeny leads to the conclusion that abstention is inappropriate here, because Cheffer is not a party to the state case, nor are her interests "intertwined" with those of the parties. *See Hicks v. Miranda*, 422 U.S. 332, 348-49 (1975); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928-29 (1975).

The majority opinion directs that the district court's order be vacated, remanding the case for application of the four-part test for preliminary injunctive relief.[4] But

[4] The implication that the district court did not examine the request for preliminary injunction in light of (a) the likelihood of

further proceedings below are unwarranted. Only different instructions to the district court are needed. When the Amended Permanent Injunction is properly viewed as an injunction, it becomes clear that the state court lacks the power to reach Cheffer. "[C]ourts . . . may not grant an injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 (1945).[5] Given the "credible threat" of prosecution posed by Judge McGregor's comments, *see Kolender*, 461 U.S. at 55 n. 3, Cheffer is entitled to an order prohibiting enforcement of the Amended Permanent Injunction against her.[6]

---

success on the merits, (b) irreparable injury, (c) relative injury to Cheffer and the clinic, and (d) whether issuance of the federal injunction would disserve the public interest is not supported by the record. The district court's order makes note of these requirements and concludes that the burden of proof was not met as to items (c) and (d).

[5] In *United States v. Hall*, 472 F.2d 261, 264 (5th Cir. 1972), this Court held that an injunction against obstructing school children's access to class could be applied to a non-party acting independently of the parties, because his conduct interfered with the plaintiff children's right to attend school and the defendant school board's duty to provide schooling. But this holding was clearly affected by the non-party's prior notice of the injunction and statement to police that he specifically intended to violate it. *See* 472 F.2d at 267 ("Rather than challenge [the injunction] by the orderly processes of law, he resorted to conscious, willful defiance."). Under the instant circumstances, Cheffer should be bound by the Amended Permanent Injunction only if she acted in concert with the named state litigants.

[6] Nothing in this dissent, or the majority opinion for that matter, would prevent entry of a separate injunction against Cheffer if she harasses, intimidates, or otherwise abridges the rights of clinic patients or staff employees.

FILED
DEC 28 1993
OFFICE OF THE CLERK

No. 93-833

In The

Supreme Court of the United States

October Term, 1993

OPERATION RESCUE, PATRICK MAHONEY, RANDALL TERRY AND BRUCE CADLE,

Petitioners,

vs.

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., AND CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Florida

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

There are several statements in the Petitioners' Statement of the Case which are incorrect but only one of these is of significance for the jurisdictional issue. The Petitioners are in error when they proclaim that, "The state supreme court . . . treated the separate appeals as consolidated." (Petitioners' brief, page 6.) This error is critical to the question of whether the Petitioners may now seek review from the decision of the Florida Supreme Court. The history of this case demonstrates that the Petitioners' state court appeal has not yet been resolved and therefore they may not seek review.

As the Petitioners acknowledge, there were two groups of appellants who sought review of the Florida Circuit Court injunctive order of April 8, 1993. The first appeal was filed on April 19, 1993 by the defendants Judy Madsen, Ed Martin and Shirley Hobbs who actually cast their papers as an appeal on behalf of all the trial court defendants. The present Petitioners filed a separate notice of appeal on May 7, 1993 and objected to being included in the first filed appeal.

Under Florida law, the separate appeals of these two groups were directed to the Florida District Court of Appeal, Fifth District and were given separate case numbers. The appellants in the first filed case then joined with the state court Appellees (the present Respondents) and filed a joint motion for certification of the first case to the Supreme Court of Florida. The present Petitioners, Operation Rescue, Patrick Mahoney, Randall Terry and Bruce Cadle, were not part of that case and did not join that motion nor was the separately filed second case in

any way referenced by the District Court of Appeal in granting the motion. (Respondents' Appendix 1.)

The Fifth District Court of Appeal did take action in the case filed by the present Petitioners and that was to stay the proceedings in their case. (Respondents' Appendix 2.) Thus, the Petitioners, who elected not to join in the first appeal of the state trial court injunction and not join with the Appellees' (now Respondents) motion to consolidate the two appeals, now find that their separate appeal is still before the Fifth District Court of Appeal.

This conclusion is underscored by the most recent court order from the Florida intermediate appellate court. After the Petition for Writ of Certiorari was filed in this Court on November 24, 1993, the Fifth District Court of Appeal entered an order in the second appeal filed by these Petitioners. The order, dated November 30, 1993, dissolved the August 13, 1993 order staying further proceedings in the Petitioners' appeal and directed the Appellees (the Respondents here) to file an answer brief in the second case. (Respondents' Appendix 3.) The brief filed in response to that order is attached. (Respondents' Appendix 4.)

CONCLUSION

Since no decision has been announced in the Petitioners' state court appeal, the Petition is premature and should be denied.

Respectfully submitted,

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APPENDIX 1.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

OPERATION RESCUE, OPERATION RESCUE AMERICA, OPERATION GOLIATH, ED MARTIN, BRUCE CADLE, JUDY MADSEN, et al.,

Appellant,

v. Case No. 93-969

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., et al.,

Appellee.

_____/

DATE: June 3, 1993

BY ORDER OF THE COURT:

The Appellants seek review of an order of the Circuit Court for Seminole County, Florida, granting a permanent injunction sharply restricting demonstrations outside an abortion clinic. The Appellants allege that the injunction infringes upon the exercise of the First Amendment rights to peacefully demonstrate, picket, distribute literature and express one's self on public property, sidewalks, roadways, and rights of way. The Appellees argue that the injunction protects their First Amendment rights, their rights to privacy, their rights to engage in business activity, and their clients' rights to obtain medical treatment. Appellants have and are engaging in such activities on a statewide basis that similar injunctions have been

issued throughout the state. The constitutionality of the injunction(s), require immediate resolution by the Florida Supreme Court. Accordingly, it is

ORDERED that the JOINT MOTION FOR CERTIFICATION OF CASE TO THE FLORIDA SUPREME COURT, filed April 27, 1993, is granted. Moreover, it is

ORDERED that this Court hereby certifies that the constitutionality of the injunction issued below is an issue of great public importance and one which will have a great effect on the proper administration of justice throughout the State. This Court therefore requests the Supreme Court of Florida to accept jurisdiction of this case pursuant to Florida Rule of Appellate Procedure 9.125.

I hereby certify that the foregoing is
(a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

(COURT SEAL)

cc: Talbot D'Alemberte, Esq.
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Patrick Mahoney, Esq.
Randall Terry, Esq.
Mathew D. Staver, Esq., and
Jeffrey T. Kipi, Esq.
Hon. Sid J. White, Clerk,
Florida Supreme Court
(with case (file)
Kathy Patrick, Esq.
Jerri Blair, Esq.
Christopher Weiss, Esq.
Sheila R. Eschenberg, Esq.

APPENDIX 2.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

OPERATION RESCUE, PATRICK MAHONEY, RANDALL TERRY AND BRUCE CADLE,

Appellant,

v. Case No. 93-1149

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., and CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC., et al.,

Appellee.

_____/

DATE: August 13, 1993

BY ORDER OF THE COURT:

ORDERED that Appellants' untimely MOTION FOR CERTIFICATION OF CASE TO THE FLORIDA SUPREME COURT, filed June 18, 1993, is denied. It is further

ORDERED that Appellees' MOTION TO STAY FURTHER PROCEEDINGS PENDING DETERMINATION OF COMPANION CASE BY FLORIDA SUPREME COURT, filed June 14, 1993, is granted. Accordingly, the appellate proceedings in this cause are stayed pending resolution by the Florida Supreme Court of *Operation Rescue v. Woman's Health Center, Inc.*, Appeal No. 93-969, Supreme

Court Case No. 81,905, certified by this Court pursuant to Florida Rule of Appellate Procedure 9.125.

I hereby certify that the foregoing is
(a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

(COURT SEAL)

cc: John Tanner, Esq., and Jay Sekulow, Esq.
John G. Stepanovich, Esq.
Mathew D. Staver, Esq., and Jeffery T. Kipi, Esq.
Talbot D'Alemberte, Esq.
Kathy Patrick, Esq.

APPENDIX 3.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

OPERATION RESCUE, PATRICK MAHONEY, RANDALL TERRY AND BRUCE CADLE,

Appellant,

v. Case No. 93-1149

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., and CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC., et al.,

Appellee.

_____/

DATE: November 30, 1993

BY ORDER OF THE COURT:

Upon consideration of the ruling by the Florida Supreme Court in *Operation Rescue v. Women's Health Center, Inc.*, No. 81,905 (Fla. October 28, 1993), it is

ORDERED that the August 13, 1993, Stay Order of this Court is dissolved. Appellees shall file their answer brief in this cause, within fifteen days from the date hereof.

I hereby certify that the foregoing is
(a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

(COURT SEAL)

cc: Christopher J. Weiss, Esq.
Jerri Blair, Esq.
Talbot D'Alemberte, Esq.
John Tanner, Esq., and Jay Sekulow, Esq.
John G. Staver, Esq., and Jeffrey T. Kipi, Esq.
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APPENDIX 4.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, FIFTH DISTRICT

OPERATION RESCUE, PATRICK MAHONEY ET AL.,

Appellants,

v.

WOMEN'S HEALTH CENTER, INC., ET AL.,

Appellees.

_____/

CASE NO. 93-01149

Appeal from Eighteenth Judicial Circuit Case No. 91-2811-CA-16-K

BRIEF OF APPELLEES

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COUNSEL FOR PLAINTIFFS

STATEMENT OF THE CASE

The events which have transpired since the Appellants filed their brief require a new statement of the case. Because the issues raised in this case have now been resolved, the statement of the case will be the predicate for the argument.

This case was the second appeal filed from an injunctive order entered on April 8, 1993 by the Hon. Robert B. McGregor of the Eighteenth Judicial Circuit. The first case, numbered 93-969 by this Court, was certified to the Supreme Court of Florida on the joint motion of the appellants in that case and the appellees. The appellants in this case were not parties to the stipulation and this case was not certified to the Supreme Court of Florida. Instead, this case was stayed by the August 13, 1993 order of this court and that order was not dissolved until November 30, 1993, when this Court also directed that this brief be filed.

During the period of this stay, the Supreme Court of Florida received briefs (including amici briefs), heard oral argument and issued its opinion affirming the April 8, 1993 injunctive order. A copy of that opinion has been filed with this Court, *Operation Rescue, et al. v. Women's Health Center, Inc., et al., No. 81,905, October 28, 1993.*

ARGUMENT

The appellants in this case elected to maintain a separate appeal and declined to join the first appeal taken by their co-defendants from the April 8, 1993 injunctive order. The first appeal (case number 93-969 before this court) was certified to the Supreme Court of Florida. That case has now been resolved and the injunctive order has been upheld.

The appellants, though not parties to the case before the Florida Supreme Court, were allowed to file a brief in that proceeding. That brief raised the same arguments advanced in the brief the appellants have filed in this

court. In the Supreme Court of Florida, the appellees were permitted to file a responsive brief but elected not to do so since the brief raised no new argument not already advanced by the original appellants.

The opinion of the Florida Supreme Court disposed of all the issues raised by the appellants in this case and they concede as much by their premature effort to seek review in the Supreme Court of the United States even before disposition of this case. On November 24, 1993, the appellants in this case filed a "Petition for Writ of Certiorari to the Supreme Court of Florida" seeking review of the decision by the Florida court.

CONCLUSION

Therefore, since there are no further issues to be addressed by this Court, the appellees respectfully request the Court to enter an opinion adopting the opinion of the Supreme Court of Florida in its case Number 81,905.

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COUNSEL FOR PLAINTIFFS

Supreme Court, U.S.
FILED
DEC 30 1993
OFFICE OF THE CLERK

(3)

No. 93-883

In The

Supreme Court of the United States

October Term, 1993

INTERSTATE COMMERCE COMMISSION
AND UNITED STATES OF AMERICA,

Petitioners,

v.

OVERLAND EXPRESS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In an action by a motor common carrier to collect its filed tariff charges may the Interstate Commerce Commission (hereinafter "ICC" or "Commission") declare the carrier's filed tariff retroactively void solely because the carrier had failed to comply with ICC regulations for the determination of distances?

LIST OF PARTIES

Respondent, Overland Express, Inc. (hereinafter "Overland") was an Indiana corporation previously engaged in common carrier transportation of freight in interstate commerce. Petitioners are the Interstate Commerce Commission and the United States of America.

The following were parties to the ICC proceeding: Jasper Wyman & Sons; Codep International; Creamette Co.; Lynn Plastics Corp.; Viviano Macaroni; Furniture Crafts, Inc.; Fibers & Fabrics of Georgia; Cotter & Co; Distribution Transportation Service, Inc.; Country Oven, Inc.; Grinnell Corp.; Purolator; Thompson Consumer; Rudy's Farm Co.; S.T. Semicon; General Motors Corp.; Kroger Co.; Drexel Co.; Alcan Aluminum Corp.; Bear Transportation; BI LO, Inc.; Charley Brothers; Warner Lambert, LTD; Davis Distribution; Life Savers, Inc.; Witco Corp.; Greenman Brothers; L.B. Transport; MSG Arlen Co.; Kraft, Inc.; MTI Freight Systems; Old Dutch Food, Inc.; Marathon Electric Manufacturing Corp.; and Preferred Products.*

---

* Respondent is unaware of any parent or subsidiary companies listed for the corporations named in this list of parties.

No. 93-883

In The

Supreme Court of the United States

October Term, 1993

INTERSTATE COMMERCE COMMISSION
AND UNITED STATES OF AMERICA,

Petitioners,

v.

OVERLAND EXPRESS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 996 F.2d 356 (D.C. Cir. 1993). The decision of the Interstate Commerce Commission is reported at 8 I.C.C.2d 246 (1992). The text of both of the opinions below are appended to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Overland concurs with Petitioners' statement of the case with the following exceptions. First, Petitioners improperly refer to the ICC's actions in voiding Overland's mileage based tariffs as enforcement of "long-standing ICC regulations . . . " *See* Petition at 2. However, the record below demonstrated that, during the 1980's, 40% of all carriers that filed mileage-based rates referenced the Household Goods Carriers Bureau (hereinafter "HGCB") Mileage Guide without participating therein. *See Overland*, 996 F.2d at 359. The ICC did not reject any of these allegedly defective tariffs. In addition, it was only after the issuance of the ICC's decision in *Jasper Wyman & Sons – Petition for Declaratory Order – Certain Rates and Practices of Overland Express, Inc.*, 8 I.C.C.2d 246 (1992), and after large numbers of shippers were faced with undercharge suits that the Commission attempted to utilize its regulations to retroactively reject carrier's tariffs for nonparticipation. *See, e.g., Overland*, 996 F.2d at 360, n.4.

Second, Petitioners note in paragraph 2 of their Statement that "[i]f a carrier fails to pay the fee for renewing its participation in the guide, *after a number of efforts* advising the carrier of the delinquency and the impending cancellation, HGCB [Household Goods Carriers Bureau] will delete its name as a participant in subsequent editions of the distance guide." *See* Petition at 4, n. 1 (emphasis added). However, the record below amply demonstrates that Overland never received any notice of its cancellation, and the Household Goods Carriers Bureau records show no evidence of ever having notified Overland of its delinquency.

REASONS FOR DENYING THE WRIT

The courts of appeal are divided in response to the question presented herein. On October 18, 1993, this Court granted the petition for writ of certiorari in *Security Services, Inc. v. K-Mart Corp.*, 996 F.2d 1516 (3d Cir. 1993), *cert. granted*, 1993 W.L. 345661, 62 U.S.L.W. 3165 (Oct. 18, 1993). As a result, Respondent opposes the issuance of a writ of certiorari at this time. Respondent concurs with Petitioners that should this Court grant a writ of certiorari, this case should be held in abeyance pending the resolution of the *K-Mart* case.

CONCLUSION

For the foregoing reasons, the Petition of the Interstate Commerce Commission and the United States of America should be denied, or in the alternative, held in abeyance pending the resolution of *Security Services, Inc. v. K-Mart Corp.*

Respectfully submitted,

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FILED
JAN 10 1994

No. 93-833

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

OPERATION RESCUE, *et al.*,
Petitioners,
v.
WOMEN'S HEALTH CENTER, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Florida

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REPLY TO BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-833

OPERATION RESCUE, *et al.*,
Petitioners,

v.

WOMEN'S HEALTH CENTER, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Florida

---

REPLY TO BRIEF IN OPPOSITION

ARGUMENT

Introduction

Respondents Women's Health Center, Inc., *et al.*, in their Brief in Opposition do not take issue with the "certworthiness" of this case or of the questions presented. Rather, respondents only challenge the ripeness of this particular petition for certiorari on behalf of these particular petitioners, namely, Operation Rescue, Patrick Mahoney, Randall Terry, and Bruce Cadle (hereafter, "OR et al.").[1]

---

[1] None of these parties is a corporation. *See* Rule 29.1.

Respondents' concerns about the prematurity of this petition are unfounded. Accordingly, this Court should grant the petition for a writ of certiorari in this case (as well as in the companion case of *Madsen v. Women's Health Center, Inc.*, No. 93-880).

Respondents' argument is that petitioners lacked party status in the proceedings in the Supreme Court of Florida and therefore lacked the ability to seek review of that decision. The flaw in respondents' reasoning is the inaccuracy of its premise. Contrary to respondents, petitioners were in fact parties to the state supreme court proceedings. To see this it is necessary briefly to review the history of this case.

Background

Women's Health Center, Inc., *et al.* (hereafter "WHC *et al.*"), plaintiffs in the state circuit court and Respondents in this Court, obtained an amended permanent injunction in the Florida circuit court against a variety of defendants, including both the present petitioners OR *et al.* and the petitioners in *Madsen v. Women's Health Center, Inc.*, No. 93-880. That amended permanent injunction, which the Supreme Court of Florida later affirmed, is now the subject of two petitions for certiorari in this Court: this one (No. 93-833), filed by OR *et al.*; and another one (No. 93-880), filed by a separate set of individuals, Judy Madsen, Ed Martin, and Shirley Hobbs (hereafter "Madsen *et al.*"), who were also defendants in the state circuit court.

After the state circuit court issued its amended permanent injunction, defendants Madsen *et al.* and defendants OR *et al.* elected to pursue separate appeals to the Fifth District Court of Appeal of Florida. Under the Florida Rules of Appellate Procedure, each set of appellants remained party to the other appellants' appeal. The Florida rules designate as an "appellee" in a case "*Every* party in the proceeding in the lower tribunal other than an

appellant," Rule 9.020(f), Fla. R. App. P. (emphasis added). Thus, the appeal of defendants Madsen *et al.* brought with it *both* the plaintiffs WHC *et al. and* fellow defendants OR *et al.*[2] Likewise, the subsequent, separate appeal of defendants OR *et al.* brought with it *both* the plaintiffs WHC *et al. and* fellow defendants Madsen *et al.*[3]

After appealing, Madsen *et al.* successfully petitioned for certification of the case to the Supreme Court of Florida, which accepted jurisdiction. This step simply transferred the proceedings in the first appeal, in their entirety, from the Fifth District Court of Appeal to the Supreme Court of Florida. *See* Rule 9.125(g), Fla. R. App. P. Thus, both WHC *et al.* and OR *et al.* remained parties to the proceedings in the state supreme court.[4]

---

[2] Respondents state, without citing anything to support the assertion, that OR *et al.* "objected to being included in the first appeal." Br. Opp. at 1. In fact OR *et al.* objected only to any claim by attorney Mathew Staver, counsel for Madsen *et al.*, to *represent* OR *et al.* OR *et al.* obtained separate representation and filed a separate notice of appeal in order to preserve their right to present arguments through counsel of their choosing. This *representational* objection to the Staver appeal cannot override the *procedural* mandate of the Florida Rules of Appellate Procedure that all parties to the lower court proceeding remain parties to the appeal. Staver's appeal, after all, was unquestionably valid as to Madsen *et al.*, i.e., as to those defendants who did authorize Staver to represent them.

[3] This practice of automatically bringing all parties to a lower court proceeding before the reviewing court is precisely the practice this Court follows. *See* Rule 12.4 ("All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court . . ." and "All parties other than petitioners shall be respondents . . .").

[4] It is therefore not at all surprising that the Supreme Court of Florida permitted OR *et al.* to file a brief as "Certain Respondents/Appellants" instead of requiring OR *et al.* to appear as *amici*. *See* Appendix A. (The term "respondents" on this document refers to "defendants" in a trial court equity action.)

Both Madsen *et al.* and OR *et al.* urged the state supreme court to reverse the injunction.

The Supreme Court of Florida affirmed. In its opinion affirming the injunction, the state supreme court drew no distinction between OR *et al.* and Madsen *et al.* Instead, the court simply referred to "Operation Rescue and others (Operation Rescue)," Pet. App. 1a, and referred to all of the defendants-appellants generically as "Operation Rescue," *see id.* at 10a, 12a, 14a, 16a, 18a-21a, 23a. Indeed, the state supreme court described the appeal before it as having been taken by Operation Rescue, *id.* at 10a, and described the matter before it as "the trial court's order," *id.*, not the appeal of only certain parties. Clearly, the Supreme Court of Florida was—properly—adjudicating the case as to the plaintiffs and *both* groups of appellants, i.e., both Madsen *et al.* and OR *et al.*[5]

OR *et al.* (No. 93-833) and Madsen *et al.* (No. 93-880) then filed separate, timely petitions for certiorari in this Court.

Conclusion

Plainly, both set of petitioners have standing to seek review, in this Court, of the adverse judgment of the Supreme Court of Florida.

For the reasons stated in the Petition for Writ of Certiorari, this Court should grant review.

---

[5] Respondents point to the fact that the Florida Fifth District Court of Appeal is still treating the second and separate appeal of petitioners OR *et al.* as requiring adjudication. But the status of the *second* appeal has no bearing on the party status of OR *et al.* in the *first* appeal. Petitioners OR *et al.* believe that the Supreme Court of Florida has *de facto* granted an earlier motion by respondents to consolidate the two appeals. *See* Pet. at 6. But the resolution of this question has bearing only upon the status of proceedings in the District Court of Appeal. Whether the two appeals were consolidated or not is irrelevant to the party status of OR *et al.* in the original appeal of Madsen *et al.*, and thus is irrelevant to the capacity of OR *et al.* to seek review, in the present petition, of the judgment of the Supreme Court of Florida.

Respectfully submitted,

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January 10, 1994

APPENDIX

SUPREME COURT OF FLORIDA

Friday, August 6, 1993

Case No. 81,905

OPERATION RESCUE, *et al.*
Appellants,

vs.

WOMEN'S HEALTH CENTER, INC., *et al.*
Appellees.

Motion Of Certain Respondents/Appellants For Leave To File Brief is granted, and the brief for Operation Rescue, Patrick Mahoney, Randall Terry and Bruce Cadle has been filed with the Court.

A TRUE COPY
TEST:

SID J. WHITE, Clerk
Supreme Court of Florida

By: s/ Barbara D. Maxwell
Deputy Clerk

[SEAL]

bdm

cc: Mr. Gerald B. Curington
Ms. Jerri A. Blair
Mr. Talbot D'Alemberte
Mr. Mathew D. Staver
Mr. Jeffrey T. Kipi
Mr. James L. Reinman
Ms. Gayle Smith Swedmark
Mr. John Tanner
Mr. Jay Alan Sekulow
Mr. Walter M. Weber
Mr. John Stepanovich
Mr. Christopher J. Weiss
Ms. Kathy Patrick